IN THE

Supreme Court of the United States

October Term, 1978

NO. 78-1543

HERBERT SPERLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Herbert Sperling, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 18, 1979.

OPINION BELOW

The order of the Court of Appeals summarily affirming the order of the District Court for the Southern District of New York is attached hereto as Appendix A. The memorandum-opinion rendered by the District Court for the Southern District of New York is attached hereto as Appendix B. The opinion of the Court of Appeals in *United States v. Sperling,* 506 F.2d 1323 (2nd Cir. 1974) is attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 18, 1979. This petition for a writ of certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner's right to due process of law was violated when his conviction was affirmed on appeal on the basis of a charge for which he was not tried or found guilty.
2. Whether the petitioner's right to due process of law was violated when the government failed to prove his guilt beyond a reasonable doubt on one of the elements of the crime charged.
3. Whether the petitioner's right to due process of law was violated when the indictment did not fairly inform him of the charges against him and deprived him of the opportunity to defend against them.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

STATUTORY PROVISIONS INVOLVED

United States Code, Title 21:

848(a)(1) Continuing Criminal Enterprise

> "Any peson who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000 and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).
>
> (2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States —
>
> (A) The profits obtained by him in such enterprise, and
>
> (B) Any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.
>
> (b) For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if —

(1) He violates any provision of this Title or Title III the punishment for which is a felony, and

(2) Such violation is a part of a continuing series of violations of this Title or Title III —

(A) Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) From which such person obtains substantial income or resources.

United States Code, Title 28, 2255 Fed. Cust.:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the Court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the Court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A Court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motions to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

United States Code, Title 21:

841(a)(1) Prohibited Acts

"(a) Except as authorized by this Title, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. 2255 because the petitioner is presently serving a non-parolable sentence of life imprisonment imposed by the United States District Court for the Southern District of New York.

In May, 1973, a superseding, twelve-count indictment was filed in the United States District Court for the Southern District of New York charging the petitioner, Herbert Sperling, and seventeen other defendants with violations of the federal narcotics laws. In Count One, Sperling and all the other co-defendants were charged with conspiracy to violate the federal narcotics laws in violation of 21 U.S.C. 846; Count Two charged Sperling alone with having engaged in a continuing criminal enterprise in violation of 21 U.S.C. 848. Sperling and other co-defendants were charged with substantive violations of the federal narcotics law in Counts 8, 9 and 10 of the indictment.

Indictment 73 Cr. 441 charged the petitioner, in Count Two, with having engaged in a continuing criminal enterprise in violation of 21 U.S.C. 848. The indictment charged as follows:

Count Two

"The Grand Jury further charges:

From on or about the 1st day of May, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, HERBERT SPERLING, the defendant, unlawfully, wilfully, intentionally and knowingly did engage in a continuing criminal enterprise in that he unlawfully, wilfully, intentionally and knowingly did violate Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A) as alleged in Counts Eight, Nine and Ten of this indictment which are incorporated by reference herein, which violations were a part of a continuing series of violations of said statutes undertaken by the defendant in concert with at least five other persons with respect to whom the defendant occupied a position of organizer, supervisor and manager

and from which continuing series of violations the defendant obtained substantial income and resources."

(Title 21, United States Code, Section 848)

(Appendix, Exhibit E, page 4)

The Court, in its instructions to the jury on Count Two, the continuing criminal enterprise count, instructed the jury that it would have to find the following elements before the petitioner could be found guilty of violating 21 U.S.C. 848.

"Count 2 is asserted against only the defendant Herbert Sperling. Before you can find the defendant Herbert Sperling guilty of the crime charged in the 2nd count of the indictment you must be convinced beyond a reasonable doubt that the government has proved the following elements:

'First, that the defendant Herbert Sperling committed the offenses charged in Counts 8, 9 and 10 of this indictment. Those counts, as you will hear, charge specific substantive offenses in July, November and December, 1971, by Herbert Sperling and Vincent Pacelli, and in the December offense also by Juan Serrano.

'Second, that the offenses charged in Counts 8, 9 and 10 of this indictment are part of a continuing series of violations of the defendant Herbert Sperling of the federal narcotic laws as contained in the Drug Abuse Prevention and Control Act of 1970.

'Third, that the defendant, Herbert Sperling, undertook to commit such offenses in concert with five or more other persons, either named or unnamed in the indictment.

'Fourth, that the defendant Sperling occupied a position of organizer, a supervisory position or other position of management with respect to such five or more other persons.

'The fifth and last essential element is proof beyond a reasonable doubt that from the continuing series of violations, if such you so find, the defendant Herbert Sperling obtained substantial income or resources.

'Now, I have already discussed the first element, which is you must be satisfied that Herbert Sperling is guilty under Counts 8, 9 and 10, but with regard to the second and third elements of proof here in Count 2, in simple terms, as I am sure you understand, the prosecution contends from the evidence that they have shown a continuing series of transactions to possess narcotics with intent to distribute and actual distribution of the same through at least five or more persons by Herbert Sperling.

'Now let me discuss with you the Fourth essential element. That is the one you remember which requires proof beyond a reasonable doubt that Mr. Sperling is an organizer or manager or person in a supervisory position. Let me say that in this connection an organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activities in one essentially orderly operation or enterprise. The supervisory position, as that phrase is used under the statute, can be defined as one who manages or directs or oversees the activities of others.

'And let me take up with you some of the definitions which may be important under the Fifth requirement or element that Mr. Herbert Sperling be shown to have substantial income or resources from illicit trafficking in heroin or cocaine or both. First of all, I point out to you that in the context of this count and the underlying statutes substantial means something that is real or actual. Furthermore, the word substantial connotes something having considerable or ample size or value.

'Finally, I instruct you that the word income here can be defined as money or other material resources received or gained from illegal narcotics transactions.

'Incidentally, I instruct you also that it does not necessarily mean net income. From what I have already said, ladies and gentlemen of the jury, it would follow that the phrase "substantial income" in this kind of a charge should be construed as far as possible in an objective manner; that is to say, in order to support a conviction under Count 2 you

should find that Herbert Sperling received what any reasonable person would consider considerable or ample funds from trafficking in heroin or cocaine as an organizer or supervisor or manager. Put differently, it would be insufficient to support a conviction here on this count if all you were to determine was that Mr. Sperling obtained an occasional moderate sum of money or resources in connection with any possession of heroin with intent to distribute same.' "
(Appendix, Exhibit F)

The jury in order to convict Herbert Sperling of engaging in a continuing criminal enterprise in violation of 21 U.S.C. 848 had to find the following elements: that Sperling committed the substantive offenses charged in Counts 8, 9 and 10 of the indictment; that these three counts were part of a continuing series of violations; that Sperling occupied a supervisory position or position of management, and that he obtained substantial income from the violations.

The trial commenced on June 18, 1973 and on July 12, 1973 Sperling and ten co-defendants were convicted on all the counts in which they were named.

On September 12, 1973 Sperling was sentenced to a term of imprisonment for life and a $100,000 fine on Count Two and to concurrent terms of 30 years' imprisonment followed by six years special parole, on each of counts one, eight, nine and ten with a total fine of $200,000 on these four counts.

On October 10, 1974, the Court of Appeals for the Second Circuit affirmed Sperling's conviction on Counts One and Two of the indictment, but remanded Count One to the District Court for re-sentencing. The Court of Appeals reversed Sperling's conviction on Counts Eight, Nine and Ten and remanded those three counts for a new trial. *United States v. Sperling,* 506 F.2d 1323 (2nd Cir. 1974), cert. den. 420 U.S. 962 (1975) (Appendix, Exhibit C). The Court of Appeals reversed and remanded Counts Three through Ten of the indictment for a new trial because of the government's failure to disclose a letter written by the only witness to these eight counts to an Assistant United

States Attorney. The Court held that the letter was significant Jencks Act material insofar as there was a significant chance that this letter utilized by skilled counsel could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. *United States v. Sperling, supra,* 506 F.2d at 1333, 1335. The Court of Appeals rejected petitioner's claim that the evidence was insufficient to convict him on Count Two, and held that the absence of the "Lipsky-Feffer" letter did not affect petitioner's conviction on Count Two. The Court of Appeals stated:

> "Moreover, Sperling's conviction of engaging in a continuing criminal enterprise involving hard narcotics was based on evidence wholly independent of Lipsky's testimony." *United States v. Sperling, supra,* 506 F.2d at 1335. (Appendix, Exhibit C, page 13)

This Court denied Sperling's pro se petition for a writ of certiorari on March 3, 1975. An order of nolle prosequi dismissing Counts Eight, Nine and Ten of Sperling's indictment was filed in the District Court on May 16, 1975. Sperling, appearing pro se by notice of motion dated July 3, 1975, moved to vacate the order of nolle prosequi and moved for a new trial on Counts Eight, Nine and Ten in order to prove his innocence, or in the alternative moved to dismiss those three counts with prejudice. The motion was denied by an order dated July 24, 1975. Sperling's appeal from that order was denied by the Court of Appeals for the Second Circuit on January 26, 1976.

On May 17, 1976, Sperling, appearing pro se, was before the District Court for re-sentencing on Count One of Indictment 73 Cr. 441. The court adhered to the original sentence that Sperling be imprisoned for thirty years and fined $50,000 on his conviction for conspiracy, that sentence to run concurrently with the life sentence and $100,000 fine previously imposed on Count Two. The Court of Appeals for the Second Circuit vacated Sperling's sentence on Count One, but ruled that if his conviction on Count Two was ever overturned, the sentence on

Count One would be reinstated. *United States v. Sperling,* 560 F.2d 1050 (2nd Cir. 1977).

On July 10, 1978, Sperling filed the present petition to vacate the conviction and sentence on Count Two of Indictment 73 Cr. 441 pursuant to 28 U.S.C. 2255. In his petition filed with the District Court, Sperling argued that since commission of the crimes charged in Counts 8, 9 and 10 of the indictment were charged by the court as an element of Count 2 of the indictment, charging him with violating 21 U.S.C. 848, the Court of Appeals' reversal of Counts 8, 9 and 10 required the reversal of Count 2 as well. Sperling claimed that he was denied due process of law when his conviction for violating 21 U.S.C. 848 was affirmed absent evidence of his having committed the crimes charged in Counts 8, 9 and 10, one of the elements of the crime charged in Count 2. Sperling further claimed that his Sixth Amendment right to a jury trial was infringed upon when his conviction on Count 2 was affirmed on the basis of a charge different from the one on which he was tried. The District Court, in a memorandum opinion filed August 31, 1978, denied Sperling's petition. The District Court held that the reversal of petitioner's convictions on Counts 8, 9 and 10 for failure to disclose Jencks Act material did not constitutionally taint his conviction on Count 2. The court further held that petitioner's challenge was based on non-constitutional error at best and petitioner had not shown "good cause" for failing to raise the present claim, a violation of 18 U.S.C. 3500, earlier (Appendix, Exhibit B). The Court of Appeals for the Second Circuit summarily affirmed the Order of the District Court on January 18, 1979 (Appendix, Exhibit A).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decision of this Court in *Presnell v. Georgia.*

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made . . . to conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the Trial Court." *Cole v. Arkansas,* 333 U.S. 196, 201-202 (1948)

The petitioner was charged in Count Two of his indictment with having violated 21 U.S.C. 848. Count Two, tracking the language of the statute, listed the various elements of the crime that the government would have to prove beyond a reasonable doubt. The first element required for conviction under 21 U.S.C. 848 was proof of the petitioner's guilt beyond a reasonable doubt that he committed the crimes charged in Counts 8, 9 and 10 of the indictment.

The government, in it's requests to charge on Count Two, requested the Court to instruct the jury that before petitioner could be convicted for violating 21 U.S.C. 848, the jury would first have to find that he committed the crimes charged in Counts 8, 9 and 10 of his indictment (Appendix, Exhibit D, pages 1 and 2).

The Court, in its instuctions to the jury, instructed them that before the petitioner could be found guilty under Count Two for violating 21 U.S.C. 848, they would have to find, on proof beyond a reasonable doubt, as the first element of the crime charged, that the petitioner had committed the substantive offenses charged in Counts 8, 9 and 10 of his indictment.

The jury, without completely ignoring the Court's charge, could not have convicted petitioner of violating 21 U.S.C. 848 without also convicting him for the substantive offenses charged

in Counts 8, 9 and 10 of the indictment. To put it another way, if the jury had acquitted the petitioner on Counts 8, 9 and 10, then, in accordance with the Court's charge, they would have had to acquit the petitioner on Count Two as well.

The jury returned a verdict against the petitioner on all five counts of the indictment in which he was charged.

The Court of Appeals for the Second Circuit, in deciding the petitioner's direct appeal, reversed petitioner's convictions on Counts 8, 9 and 10 of the indictment and remanded those counts to the District Court for a new trial. The Second Circuit, in reversing petitioner's conviction on Counts 8, 9 and 10 should also have reversed petitioner's conviction on Count Two, because the three counts that were reversed were required to be proven beyond a reasonable doubt in order to convict the petitioner for violating 21 U.S.C. 848.

The Second Circuit affirmed petitioner's conviction for violating 21 U.S.C. 848 in Count Two of his indictment on a new theory that removed from the case the government's burden of proving petitioner's guilt on Counts 8, 9 and 10, proof of which was required by the Court's instructions to the jury to convict him of violating 21 U.S.C. 848.

A careful analysis of the entire record, including the opinion of the United States Court of Appeals for the Second Circuit in *United States v. Sperling,* 506 F.2d 1323 (Appendix, Exhibit C, page 22), shows the new version of Section 848 as propounded by the Court of Appeals as opposed to the crime as it was charged in the indictment and charged to the jury.

The Indictment in Count Two, charged as follows:

"Herbert Sperling, the defendant unlawfully wilfully, intentionally and knowingly did engage in a continuing criminal

The Court's charge on Count Two was as follows:

"Count 2 is asserted against only the defendant Herbert Sperling. Before you can find the defendant

The Court of Appeals Opinion in *United States v. Sperling, supra,* 506 F.2d at 1344:

"To establish a violation of Section 848, it was incumbent upon the government to

enterprise in that he unlawfully, wilfully, intentionally and knowingly did violate Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A) as alleged in Counts Eight, Nine and Ten of this indictment which are incorporated by reference herein, which violations were a part of a continuing series of violations of said statutes undertaken by the defendant in concert with at least five other persons with respect to whom the defendant occupied a position of organizer, supervisor and manager and from which continuing series of violations the defendant obtained substantial income and resources." (Appendix, Exhibit B, page 4).

Herbert Sperling guilty of the crime charged in the 2nd count of the indictment you must be convinced beyond a reasonable doubt that the government has proved the following elements: First, that the defendant Herbert Sperling committed the offenses charged in Counts 8, 9 and 10 of this indictment . . . Second that the offenses charged in Counts 8, 9 and 10 of this Indictment are part of a continuing series of violations of the defendant Herbert Sperling of the Federal narcotic laws as contained in the Drug Abuse Prevention and Control Act of 1970 . . . Now I have already discussed the first element, which is you must be satisfied that Herbert Sperling is guilty under Counts 8, 9 and 10. . . ." (Appendix, Exhibit F, pages 1 and 2).

prove that Sperling occupied a position as organizer or a managerial or supervisory position with respect to a continuing narcotics trafficking operation in concert with five or more other persons, and that he received substantial resources from the operation." (Appendix, Exhibit C, page 22).

In this case, the jury was instructed by the Trial Court that the petitioner could be convicted for violating Section 848 if they found, and only if they found, that he committed the substantive offenses charged in Counts 8, 9 and 10 of the indictment; that these three counts were part of a continuing series of violations by appellant; that he occupied a supervisory position or position of management; and that he obtained substantial income from these violations. The jury found petitioner guilty on Counts One, Two, Eight, Nine and Ten of the indictment.

On Appeal the Second Circuit treated petitioner's conviction for violating Section 848 as one not requiring proof of guilt of the substantive offenses charged in Counts 8, 9 and 10 of the indictment, and under this new theory or version of the offense charged affirmed his conviction on that Count. Petitioner had argued in the Court of Appeals that the evidence was insufficient to sustain his conviction for violation of Section 848 and the evidence was insufficient to convict, as the prosecution was required to prove his guilt on Counts 8, 9 and 10 as an element of the crime charged. The Second Circuit side-stepped the issue by treating the offense charged as one that did not require proof of petitioner's guilt on Counts 8, 9 and 10 of the indictment as one of the elements necessary for conviction under Section 848. This was extremely prejudicial to the rights of the petitioner to due process of law. The reversal by the Second Circuit of Counts 8, 9 and 10 of the indictment would have required the reversal of petitioner's conviction for violating Section 848 in the absence of any proper jury verdict on those three counts if the case had been considered on appeal on the same theory that it had been tried in the District Court. *Presnell* makes clear that the Second Circuit could not conduct its own examination of the record to supply the missing elements of the crime charged. The Second Ciruit, in fashioning its own version of Section 848, which was substantially different from the version of Section 848 on which the case was tried, relieved the burden of the government of having to prove petitioner's guilt on Counts 8, 9 and 10, a burden which the government could not carry, depriv-

ed the petitioner of due process of law.

Petitioner has been deprived of his constitutional right to have his conviction reviewed on the basis of the indictment and the Court's instructions to the jury. The District Court's denial of petitioner's claim for relief under 28 U.S.C. 2255 was made not on the basis of the petitioner's petition for relief, but rather on the basis of the Second Circuit's version of Section 848, and issues, such as Jencks Act material, which were not raised by the petition, and thus the original error is not corrected, but is instead perpetuated.

In petitioner's case the jury's verdict of guilty on Counts 8, 9 and 10 of his indictment were the same offenses that the jury had to rely on to make out the first element of the crime charged in Count Two of the indictment, 21 U.S.C. 848. The Second Circuit's affirmance of petitioner's conviction on Count Two on a basis or theory that did not require proof of petitioner's guilt on Counts 8, 9 and 10 denied petitioner due process of law. The Second Circuit could not uphold petitioner's conviction by ruling that the jury could have believed other evidence indicating that the petitioner had violated Section 848. *Presnell v. Georgia,* ____U.S.____, 58 L.Ed.2d 207, 215, 99 S.Ct. 235, 239 (1978). On appeal, the issue is not upon what evidence the accused could be found guilty, but upon what evidence he was found guilty. *Eaton v. City of Tulsa,* 415 U.S. 697, 698 (1974).

The conflict between the decision below and the recent decision of this Court in *Presnell v. Georgia* justifies the grant of certiorari to review the judgment below.

2. The Decision Below Conflicts With the Decision of this Court in *Spevack v. Klein* and *Cole v. Arkansas.*

In the Second Count of his indictment, the petitioner was charged with having violated 21 U.S.C. 848. The petitioner was informed by the language in the indictment and by the Court's instructions to the jury that before he could be found guilty of

having violated Section 848, the jury would have to find that he had committed the substantive violations of the federal narcotics law charged in Counts 8, 9 and 10 of the indictment, that the acts charged in Counts 8, 9 and 10 were part of a continuing series of violations of the federal narcotics law, that petitioner occupied a supervisory position or position of management over five or more individuals, and that he obtained substantial income from the series of violations. Counsel for both sides, as well as the Court, consistently maintained throughout the trial that all of the enumerated elements recited above would have to be proven beyond a reasonable doubt before the petitioner could be convicted of violating Section 848.

The Second Circuit for the first time held in its decision on petitioner's appeal of his conviction that the government did not have to prove petitioner's guilt beyond a reasonable doubt on Counts 8, 9 and 10 in order to convict him of violating Section 848. The Court of Appeals by utilizing a new version of Section 848 was the first court to suggest that petitioner's conviction for violating 21 U.S.C. 848 could be upheld without proof of his guilt on Counts 8, 9 and 10 of the indictment. The Second Circuit not only evaded ruling on the petitioner's claim that the evidence was insufficient to convict him of violating Section 848, but by affirming his conviction for violating Section 848 under a version of the law that was substantially and prejudicially different from the version of the law set forth in the indictment and charged by the court to the jury, the Second Circuit, having reversed petitioner's conviction on Counts 8, 9 and 10, was thus able to avoid having to reverse petitioner's conviction for violating 21 U.S.C. 848.

The Second Circuit, by propounding a new and different version of Section 848 for the first time on appeal, deprived the petitioner of all opportunity to show that proof of his guilt on Counts 8, 9 and 10 was a necessary element of the crime charged in Count Two of the indictment that had to be proven by proof beyond a reasonable doubt, and moreover, it deprived petitioner of the opportunity to

show that the government had failed to prove his guilt beyond a reasonable doubt due to the insufficiency of the evidence against him. The evidentiary items that became available after the conclusion of petitioner's trial because of the government's failure to disclose them during the trial, obviously had significant impact upon a jury because those of petitioner's co-defendants whose convictions were reversed and whose cases were re-tried were all acquitted.

The Second Circuit, by proceeding to affirm the petitioner's conviction under a new version of Section 848, unveiled for the first time on appeal, deprived the petitioner of all notice of the elements of the crime charged. Petitioner was deprived of all opportunity to make a meaningful defense because evidence that was necessary to defend against the elements of the crime charged at trial and required by law to be made available to the defense became unnecessary and superfluous on the consideration of petitioner's appeal, while other evidence that was not offered on trial to prove the felony predicate required for conviction under 21 U.S.C. 848(b), on appeal suddenly became crucial because they were utilized by the Second Circuit to sustain the petitioner's conviction for violating 21 U.S.C. 848.

Prior to the opinion by the Second Circuit on petitioner's direct appeal,petitioner had no notice, either in the indictment or in the instructions to the jury, that the government would rely on any other proof than those crimes charged in Counts 8, 9 and 10 of his indictment, to prove the "felony predicate" required for conviction under 21 U.S.C. 848(b).

The petitioner was never given notice by the indictment of the version of Section 848 that was ultimately reviewed and upheld by the Second Circuit, and it is clear that he never defended himself against the second version of Section 848 propounded for the first time on his appeal of his conviction.

The correctness of the decision below is open to serious question and coupled with the conflict between the decision below and the controlling pronouncements of this Court in *Spevack v. Klein,* 385 U.S. 511, 518 (1967), *Cole v. Arkansas,* 333 U.S.

196, 201 (1948), and *Presnell v. Georgia,* ____U.S.____, 58 L.Ed.2d 207, 211, fn. 3, 99 S.Ct. 235, 236, fn. 3 (1978), justifies the grant of certiorari to review the judgment below.

3. The Decision Below Violates the Principles of *In Re Winship,* 397 U.S. 358.

Petitioner was clearly entitled, as a matter of due process, to have the government bear and discharge the obligation of proving all of the elements of the crime charged beyond a reasonable doubt.

> "We explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970).

In 21 U.S.C. 848(b), Congress set down the elements required to be proven to establish that one is engaged in a continuing criminal enterprise. The law requires proof that the petitioner violated a felony provision of the Drug Abuse Prevention and Control Law and that such violation was part of a continuing series of violations of the law undertaken by the petitioner in concert with five or more other individuals with respect to whom the petitioner occupied a position of organizer, supervisor or some position of management and from which the petitioner obtained substantial income. In this case the Court, in compliance with the law and at the request of the government, instructed the jury that before the petitioner could be found guilty of violating Section 848, they would have to find that the petitioner committed the substantive violations of the Drug Abuse Prevention and Control Act as charged in Counts 8, 9 and 10 and that they were part of a continuing series of violations of the law, that the petitioner was the manager or supervisor over five or more individuals committing the continuing

series of violations, and he obtained substantial income or resources from the continuing series of violations. The charge given by the court in this case has been cited with approval in Devitt and Blackmar, *Federal Jury Practice and Instructions*, Volume 2, Section 58.21, West Pub. Co. (1977), and having been given to the jury without objection, it became the "law of the case."

The "felony predicate" required for conviction under Section 848 was proof beyond a reasonable doubt that the petitioner had committed the substantive offenses charged in Counts 8, 9 and 10 of his indictment, and this element, like all the elements of the crime charged, had to be proven by the government by proof beyond a reasonable doubt. The District Court, in denying petitioner's claim for relief under 28 U.S.C. 2255, held that proof of petitioner's guilt on Counts 8, 9 and 10 was amply shown in the record and supported this finding by reference to the decision of the Second Circuit in *United States v. Sperling*, 506 F.2d 1323, 1344 (2nd Cir. 1974) in which the Circuit held that there was more than sufficient evidence to sustain petitioner's conviction. The decision by the Second Circuit in *United States v. Sperling, supra*, is based upon that court's version of Section 848 which is substantially different from the version of Section 848 that petitioner was tried for. The Court of Appeals for the Second Circuit deleted all reference to Counts 8, 9 and 10 in discussing petitioner's conviction for violating Section 848, and improperly relieved the government of its burden of having to prove petitioner's guilt beyond a reasonable doubt on Counts 8, 9 and 10 of his indictment. This is crucial to any understanding of what transpired in the court below, especially when we consider that petitioner's convictions on Counts 8, 9 and 10 were reversed and remanded for a new trial. *United States v. Sperling, supra*, 506 F.2d at 1345, and those three counts were never re-tried but were eventually *nolle prosequi*.

Once the District Court had instructed the jury that proof of petitioner's guilt on Counts 8, 9 and 10 of his indictment was an

element of the crime charged in Count Two of the indictment, 21 U.S.C. 848, the government was obligated to prove this element of the crime charged by proof beyond a reasonable doubt. The court's instructions to the jury, being the "law of the case", made proof of petitioner's guilt on Counts 8, 9 and 10 a necessary element of the crime charged under Section 848, and it had to be proven beyond a reasonable doubt. *United States v. Spletzer*, 535 F.2d 950, 954 (5th Cir. 1976); *Hartford v. United States*, 362 F.2d 63, 64 (9th Cir. 1966); *United States v. Cluck*, 542 F.2d 728, 731 (8th Cir. 1976); *United States v. Winn*, 411 F.2d 415, 417 (10th Cir. 1969); *United States v. Johnson*, 495 F.2d 242, 244 (10th Cir. 1974); *United States v. Woodring*, 464 F.2d 1248, 1251 (10th Cir. 1972); *Pelz v. United States*, 54 F.2d 1001, 1003 (2nd Cir. 1932); *United States v. Denno*, 208 F.2d 605, 609 (2nd Cir.), rev. on other grounds, *United States ex rel. Leyra v. Denno*, 347 U.S. 556 (1954).

The denial by the District Court of petitioner's request for relief under 28 U.S.C. 2255 was based upon and compounded the errors in the original decision of the Second Circuit in *United States v. Sperling*, 506 F.2d 1323 (2nd Cir. 1974). The Second Circuit never found ample proof of petitioner's guilt on Counts 8, 9 and 10 as the District Court held. (Appendix, Exhibit C, page 13). The Second Circuit reversed those three counts and remanded them for a new trial. (Appendix, Exhibit C, page 23).

The District Court's finding, again based on the Second Circuit's opinion in *United States v. Sperling, supra*, 506 F.2d at 1323, that there was more than sufficient evidence to support petitioner's conviction for violating 21 U.S.C. 848, is also at variance with the facts of the case as it was tried since there was no proper jury verdict concerning petitioner's guilt on Counts 8, 9 and 10, one of the elements necessary for conviction under the court's instructions to the jury.

The conflict between the decision below and the controlling decisions of this court justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Second Circuit or, in the alternative, the Court should summarily reverse the judgment of the Second Circuit.

Respectfully submitted,

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Suite 1007

Appendix

APPENDIX A—ORDER OF COURT OF APPEALS

United States Court of Appeals
for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of January, one-thousand nine hundred and seventy-nine.

Present:

HON. STERRY R. WATERMAN
HON. MURRAY I. GURFEIN
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges,

HERBERT SPERLING,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

78-2127

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is AFFIRMED.

s/ Sterry R. Waterman
STERRY R. WATERMAN

s/ Murray I. Gurfein
MURRAY I. GURFEIN

s/ Ellsworth A. Van Graafeiland
ELLSWORTH A. VAN GRAAFEILAND
C.JJ.

APPENDIX B—MEMORANDUM DECISION

MEMORANDUM

United States of America v. Herbert Sperling 78 Civ. 3099 (MP) (73 Cr. 441)

Sperling contends that the absence of a "guilty" verdict on three of the substantive counts in the indictment (8, 9, 10) removes the basis for his conviction for engaging in a continuing Criminal Enterprise under 21 U.S.C. 848 (Count 2) because the charge of the jury required it to find that he had *committed the offenses* set forth in those counts. Counts 8, 9 and 10 were ultimately nolle prosequid after guilty verdicts thereon were set aside and those counts ordered retried due to the government's failure to produce a certain letter affecting a witness' credibility, viz., violation of a Jencks Act requirement, 18 U.S.C. §3500. The appellate court in ordering the retrial of those counts expressly found nonetheless that

> "We also hold that Sperling's conviction on Count Two was not affected by the absence of the Lipsky-Feffer letter" [the omitted Jencks Act disclosure] 506 F.2d at 1337 n. 18.

The appellate court did not reverse and dismiss Counts 8, 9 and 10 as it would have done if the evidence of Sperling's commission of the offenses had been lacking. *Burks v. United States,* 46 U.S.L.W. 4632 (Sup. Ct. June 14, 1978). That is, the proof of

Sperling's commission of the offenses charged under Counts 8, 9 and 10 was amply shown in the record and Count 2 was therefore properly considered by the jury and resolved in favor of the government pursuant to the charge of the Trial Judge on the issue of the existence of a criminal enterprise under 21 U.S.C. §848. The Court of Appeals expressly found that the verdict under Count Two (the continuing enterprise) was supported by "more than sufficient evidence" 506 F.2d at 1344. Thus no constitutionally required evidence was lacking for the Sperling conviction under Count Two. The non-disclosure of Jencks Act material which tripped the conviction on Counts 8, 9 and 10 did not constitutionally taint conviction under Count Two—the failure to apply such a statute raises no issue of constitutional dimension.

There was no fundamental defect herein which inherently resulted in any miscarriage of justice and the matter now conjured up on Sperling's behalf is merely a challenge bottomed on non-constitutional error at best. Such a challenge does not ground collateral review under §2255. *Kaufman v. United States,* 394 U.S. 217, 223 (1969); *Hill v. United States,* 368 U.S. 424, 428 (1962); *Sunal v. Large,* 332 U.S. 174 (1947). "The writ of habeas corpus and its federal counterpart, 28 U.S.C. §2255, will not be allowed to do service for an appeal", with respect to non-constitutional error. *Stone v. Powell,* 428 U.S. 465, 477, n.10 (1976). Moreover, the present challenge is too late. Sperling never challenged his conviction heretofore under Count Two based on the non-disclosure of the Jencks Act material. The time to do so was on his direct appeal or on petition for rehearing after affirmance of the conviction on Count Two. Other opportunities* have intervened since then without a word suggesting the present challenge. Even if we assume that these opportunities following the appeal would have been considered

*Writ of certiorari to the Supreme Court from affirmance; challenge of the nolle prosequi dismissing Counts 8, 9 and 10 without prejudice; petition challenging conviction on Count I as a lesser included offense in Count II.

too late, the present claim asserted still later certainly precludes review under §2255. Without any doubt, there has been no good "cause" for the previous omission to raise the present claim.

In sum, the Court of Appeals affirmed Sperling's conviction on Count Two on "more than sufficient" evidence and its decision that the Jencks Act error did not taint any Counts other than 8, 9 and 10 [not Two] gives no ground arising under or protected by the Constitution.

Petition Denied.

SO ORDERED.

S/Milton Pollack

August 31, 1978 U.S. District Judge

APPENDIX C

Decision in United States v. Sperling, 506 F.2d 1323 (1974)

UNITED STATES OF AMERICA, *Appellee,* v. HERBERT SPERLING et al., *Appellants.*

Nos. 643, 782, 783, 849, 850, 851, 862, 863, 864, 865, 1071, Dockets 73-2363, 73-2366, 73-2379, 73-2387, 73-2397, 73-2412 73-2420, 73-2446, 73-2512, 73-2714, 73-2742.

United States Court of Appeals, Second Circuit.

Argued April 10, 1974. Decided Oct. 10, 1974.
Certiorari Denied March 3, 1975. See 95 S.Ct. 1351.

On appeal from convictions after jury trial in the Southern District of New York, Milton Pollack, J., of eleven defendants of conspiring to violate federal narcotics laws, seven of whom also were convicted on substantive counts of distributing and possessing with intent to distribute hard narcotics and one of whom also was convicted of engaging in a continuing criminal enterprise involving hard narcotics, the Court of Appeals, Timbers, Circuit Judge, held (i) that refusal of trial court to receive in evidence one letter written by government witness to Assistant United States Attorney and restricted use of the letter on cross-examination was not an abuse of discretion; (ii) that failure of government to provide defendants with another letter written by the same government witness to another Assistant United States Attorney was error and, in cases in which there was no corroboration of government witness' testimony, required reversal of those convictions; (iii) that evidence established existence of a single conspiracy; (iv) that evidence was insufficient under single act doctrine to support conspiracy conviction of three defendants; (v) that statute prohibiting participation in a continuing criminal enterprise involving hard narcotics was not unconstitutiona; and (vi) that evidence sustained the

conviction of one defendant under that statute.

Affirmed in part; reversed and remanded for a new trial in part.

See also, D.C., 362 F.Supp. 909.

1. Criminal Lawl §433. Witnesses §267

Where informant was questioned at length about letter which he had written to assistant United States attorney, where informant admitted having falsely stated in the letter that his untruthful answers at earlier trials were unintentional, where he acknowledged having expressed his appreciation to the assistant United States attorney for the help he had received in connection with the murder charge against him, and where there was no claim that the letter differed in any way from what the informant testified it contained, the exclusion of the letter itself, as well as restriction of certain cross-examination of the informant regarding the letter was within the discretion of the trial court.

2. Criminal Law §438.1

Trial court acted within its discretion in excluding from evidence tape recordings of conversations between an assistant United States attorney and government informant who testified at trial. 18 U.S.C.A. §3500.

3. Criminal Law §627.6(2)

United States was required under the Jencks Act to produce letter written by government informant who testified at trial, to assistant United States attorney in which the informant revealed favors which he had received from the Government in the past and which he hoped for in the future, none of which were disclosed at trial, and which showed that informant's testimony was tailored to what the Government wanted to hear. 18 U.S.C.A. §3500.

4. Criminal Law §700

Where assistant United States attorney to whom government

informant, who testified at trial, had written letter was still working in that capacity when the case was tried, his failure to make the letter known to the prosecutors at trial, so that they could make it available to defendants, could not be excused as due to a breakdown in channels of communication. 18 U.S.C.A. §3500.

5. Criminal Law §1166(1)

Government's failure to provide defendants with significant Jencks Act materials requires reversal if there is a significant chance that the added item, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. 18 U.S.C.A. §3500.

6. Criminal Law §1166(1)

In determining whether failure to provide defendants with certain Jencks Act materials which involved prior statements made by government informant who testified at trial, required reversal, reviewing court would analyze the material in an effort to determine its potential usefulness on cross-examination of the informant and, in light of that determination, would attempt to evaluate the impact which the material might have had with respect to the case against each defendant in view of the nature and quantum of evidence against each. 18 U.S.C.A. §3500.

7. Criminal Law §1166(1)

Where letter, which was written by government informant, who testified at trial, to assistant United States attorney and which would have supported cross-examination of that witness to the effect that his testimony was unreliable, to the effect that he was hopeful of future government favors, and to the effect of status of murder charge pending against him, was not made available to the defendants, and where informant's testimony was virtually uncorroborated, failure of Government to produce the letter, as required by Jencks Act, required reversal of convictions for possession and distribution of cocaine and

heroin, even though cross-examination of the informant brought out his prior convictions and past favors which he had received from the Government. Comprehensive Drug Abruse Prevention and Control Act of 1970, §§202, 401(a)(1), (b)(1)(A), 21 U.S.C.A. §§812, 841(a)(1). (b)(1)(A); 18 U.S.C.A. §3500.

8. Criminal Law §1166(1)

Where virtually all the evidence of three defendants' participation in narcotics conspiracy was adduced through testimony of witnesses other than government informant, and where that evidenced was corroborated by electronic and visual surveillance, fact that letter written by government informant to assistant United States attorney was not made available to defendants in accordance with Jencks Act for use in cross-examination of the informant did not require reversal. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846; 1805 CA §3500.

9. Criminal law §641.8

1 Where defendant attempted to manipulate his right to counsel for the purpose of delaying and disrupting trial, his Fifth and Sixth Amendment rights were not violated because he was compelled to stand trial without the assistance of retained counsel. U.S.C.A. Const. Amends. 5, 6.

10. Criminal Law §1166(1)

Where government informant's testimony as to one defendant's participation in conspiracy was corroborated by defendant's testimony as to his knowledge of both informant and another involved in the conspiracy and as to certain meetings with the informant and the other person and where photographs were received in evidence which linked defendant to others in the conspiracy, failure of Government, pursuant to Jencks Act, to provide defendant with letter written by government informant to assistant United States attorney did not require reversal

of defendant's conspiracy conviction. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846; 18 U.S.C.A. §3500.

11. Criminal Law §1166(1)

Where government informant's testimony as to three defendants' involvement in conspiracy to distribute narcotics was corroborated by testimony of police officers who had observed delivery transactions and who found cocaine in pocket of one of the defendants shortly after transaction, which was apparently a delivery of narcotics, failure of government pursuant to Jencks Act, to provide defendants with letter written by government informant to assistant United States attorney did not require reversal of defendants' conspiracy convictions. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846; 18 U.S.C.A. §3500.

12. Criminal Law §394.4(9)

Where arrest of one defendant was based on probable cause and search incident thereto was proper, trial court properly admitted cocaine found during the search into evidence in defendant's trial for conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846; 18 U.S.C.A. §3500.

13. Criminal Law §1166(1)

Where government informant's testimony as to one defendant's involvement in narcotics conspiracy was corroborated by testimony of another witness to the effect that her apartment had been used by the defendant as a stash and cutting mill and by witness who testified that he had purchased 20 to 30 kilos of cocaine from defendant, failure of Government, pursuant to Jencks Act, to provide defendant with letter written by government informant to assistant United States attorney did not require reversal of defendant's conspiracy conviction. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846; 18 U.S.C.A. §3500.

14. Criminal Law §783(a)

Cautionary instruction given by trial court was adequate to protect defendant's right with respect to admission of stipulation between defendant's brother and the Government, which stipulation was read to the jury.

15. Criminal Law §1166(1)

Where there was virtually no corroboration of government informant's testimony linking three of 11 defendants to narcotics conspiracy and where some of informant's testimony was sharply contradicted, failure of Government, pursuant to Jencks Act, to provide defendants with copy of letter which was written by defendant to assistant United States attorney and which contained material which would have been useful in cross-examination of the informant required reversal of the three defendants' convictions for conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846; 18 U.S.C.A. §3500.

16. Conspiracy §47(12)

Although, in view of the large number of persons involved, in view of fact that there was more relationship within two groups than there was between the two groups and in view of fact that only one witness testified against all defendants, it would have been better for government to have prosecuted case as if it involved two separate conspiracies; evidence that there was a connection between leaders of two narcotics distribution rings clearly established existence of one large conspiracy to distribute heroin and cocaine for profit. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

17. Conspiracy §24

Fact that each of the conspirators was not acquainted with each of the others did not preclude them all from being charged with participating in a single large conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

18. Conspiracy §48.2(2)

Trial court's charge on issue of conspiracy, which explained essential elements of the crime of conspiracy and which focused jury's attention on importance of determining whether each defendant had joined the conspiracy and the scope of his agreement and which specifically instructed jury that they must find defendants not guilty if the Government failed to prove the existence of only one conspiracy to possess and distribute narcotics was proper. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

19. Conspiracy §48.2(1)

Instruction to effect that if jury finds defendants to be members of a conspiracy then each defendant is criminally responsible for substantive crime and may be found guilty should not be given as matter of course, especially where the evidence of the substantive crimes is greater than that of the conspiracy and may be used to demonstrate the existence of the conspiracy.

20. Criminal Law §622(2)

Where there was more than adequate evidence of the existence of a single conspiracy, court did not abuse its discretion in denying motions for severance.

21. Conspiracy §47(12)

Evidence demonstrated that three defendants, who asserted that there was insufficient evidence they were aware of the scope of the conspiracy, were deeply involved in large-scale narcotics conspiracy and were well aware of its scope. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

22. Conspiracy §47(12)

For a single act to be sufficient to draw an actor within the ambit of the conspiracy to violate the federal narcotics laws,

there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which such knowledge may be inferred. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

23. Conspiracy §44½

One defendant's delivery of cocaine to another was not sufficient to support an inference of knowledge of a broader conspiracy on the part of the two defendants. Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

24. Criminal Law §1177

Where there was overwhelming evidence to support two defendants' convictions on one substantive count of distributing and possessiong cocaine, defendants were not prejudiced by submission of count charging conspiracy so that, even though the conspiracy count was not sustained by sufficient evidence, submission of that count did not require reversal of the substantive count. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§202, 401(a)(1),(b)(1)(A), 406, 21 U.S.C.A. §§812, 841(a)(1), (b)(1)(A), 846.

25. Criminal Law §1188

Where two defendants received concurrent sentences on both conspiracy and substantive counts, but where fact of conviction of both counts might have affected the sentence imposed and where conspiracy conviction had been reversed, their cases would be remanded for reconsideration of sentencing.

26. Criminal Law §1186.1

Mere fact that trial court instructed jury on conspiracy charge, for which reviewing court found that there was insufficient evidence, did not require reversal of two defendants' convictions on substantive count, even though trial court also in-

structed jury that, if they found that a conspiracy existed, each member of that conspiracy would be responsible for the substantive criminal acts.

27. Criminal Law §13.1(9)

Statute, which prohibits engaging in a continuing criminal enterprise involving hard narcotics, is not void for vagueness. Comprehensive Drug Abuse Prevention and Control Act of 1970. §408, 21 U.S.C.A. §848.

28. Drugs and Narcotics §107

In order to establish violation of statute prohibiting engaging in continuing criminal activity involving hard narcotics, it is incumbent upon the Government to prove that defendant occupied a position as organizer or a managerial or supervisory position with respect to continuing narcotics-trafficking operation in concert with five or more persons and that he received substantial income or resources from the operation. Comprehensive Drug Abuse Prevention and Control Act of 1970, §408, 21 U.S.C.A. §848.

29. Drugs and Narcotics §123

Evidence, that defendant was operational kingpin of highly organized, structured and ongoing narcotics network and that a number of individuals mixed heroin for defendant on more than 26 occasions and that each occasion involved possession and distribution of between one-half kilo and three kilos of pure heroin, was sufficient to sustain defendant's conviction for engaging in a continuing criminal enterprise involving hard narcotics. Comprehensive Drug Abuse Prevention and Control Act of 1970, §408, 21 U.S.C.A. §848.

30. Drugs and Narcotics §107

In order to obtain conviction against defendant for engaging in a continuing criminal enterprise involving hard narcotics, it was not necessary for Government to prove that five or more

persons were working for the defendant at the same moment. Comprehensive Drug Abuse Prevention and Control Act of 1970, §408, 21 U.S.C.A. §848.

31. Indictment and Information §110(3)

Indictment, which charged violation of statute prohibiting engaging in continuing criminal conduct involving hard narcotics, which tracked statutory language, and which contained every element of the offense charged, was sufficient, even though it did not specify the names of the persons with whom defendant supposedly acted in concert and as to whom he occupied a position of organizer, especially where defendant was provided with a bill of particulars which identified eight persons as to whom he occupied that position. Comprehensive Drug Abuse Prevention and Control Act of 1970, §408, 21 U.S.C.A. §848.

32. Criminal Law §1131(5)

Where defendant had escaped during pendency of his appeal and had not returned to custody, his appeal would be dismissed with prejudice.

Raymond E. LaPorte, Tampa, Fla., for appellant Sperling.

Robert Mitchell, New York City, for appellant Goldstein.

Robert B. Schwartz, New York City (Albert J. Krieger, Alan F. Scribner and Krieger, Fisher, Metzger & Scribner, New York City, on the brief), for appellant Bless.

Alfred Lawrence Toombs, New York City, for appellant Juan Serrano.

Nancy Rosner, New York City, for appellant Bassi.

Joel A. Brenner, Mineola, N.Y. (Howard J. Diller and Diller & Schmukler, New York City, on the brief), for appellant Berger.

Michael A. Young, New York City (William J. Gallagher, The Legal Aid Society, New York City, on the brief), for appellant Frank Serrano.

Victor L. Brizel, New York City, for appellant Valentine.

Allen S. Stim, New York City, for appellant Del Busto.

Stuart R. Shaw, New York City (Roy A. Jacobs and Leavy, Shaw & Horne, New York City, on the brief), for appellant Garcia.

Irving Anolik, New York City, for appellant Schworak.

Lawrence S. Feld, Asst. U.S. Atty., New York City (Paul J. Curran, U.S. Atty., John D. Gordan III, S. Andrew Schaffer and James P. Lavin, Asst. U.S. Attys., New York City, on the brief), for appellee.

Before FRIENDLY and TIMBERS, Circuit Judges, and THOMSEN, District Judge.*

TIMBERS, Circuit Judge:

Appellants Herbert Sperling, Norman Goldstein, Jack Bless,[1] Juan Serrano, Frank Bassi, Jr., Fred Berger, Frank Serrano, Luis Valentine, Octavio Del Busto, Nelson Garcia and Edward Schworak[2] appeal from judgments of conviction entered upon jury verdicts returned in the Southern District of New York on July 12, 1973 after a four-week trial before Milton Pollack, *District Judge,*[3] finding all appellants guilty of conspiring to violate the federal narcotics laws in violation of 21 U.S.C. §846 (1970) (Count One);[4] finding Sperling, Bless, Juan Serrano, Frank Serrano, Valentine, Del Busto and Garcia guilty on substantive counts of distributing and possessing with intent to distribute hard narcotics in violation of 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A) (1970) (Counts Three through Eleven);[5] and finding Sperling guilty of engaging in a continuing criminal enterprise involving hard narcotics in violation of 21 U.S.C. §848 (1970) (Count Two).

Of the numerous claims of error raised on appeal, we find the following to be the principal ones: (1) all appellants claim error with respect to the testimony of co-conspirator Barry Lipsky, the principal government witness; (2) Goldstein, Juan Serrano, Berger, Frank Serrano, Valentine, Del Busto and Garcia claim that there was a material variance between the single conspiracy

charged and the multiple conspiracies said to have been proven, and that the evidence was insufficient to support their conspiracy convictions; and (3) Sperling challenges the constitutionality of 21 U.S.C. §848 (1970) and claims that there was insufficient evidence to support his conviction on Count Two. Other subordinate claims of error are also raised.

We affirm in part, and reverse and remand for a new trial in part.

I. OVERALL CONSPIRACY

In view of the issues raised on appeal, we summarize here the essential facs, viewed in the light most favorable to the government, United States v. McCarthy, 473 F.2d 300, 302 (2 Cir. 1972), which showed the nature and scope of a very large, well organized and highly profitable conspiracy from May 1, 1971 to mid-April 1973 among appellants and others to purchase, process and resell hard narcotics. Other more detailed facts necessary to an understanding of our rulings on the legal issues raised will be stated in connection with our discussion of those issues below.

At the hub of the conspiracy were Vincent Pacelli, Jr. and Sperling. Each had at his command the services of others and the sources and outlets for narcotics. Each caused narcotics to be bought, processed and sold. Pacelli had good sources of cocaine; he sold it to Sperling for resale to Sperling's customers. Sperling had good sources of heroin; he sold it to Pacelli for resale to Pacelli's customers. The evidence showed that each of the 11 appeallants had a specific role in the conspiracy.

Evidence concerning the Pacelli part of the overall conspiracy was adduced primarily through the testimony of Barry Lipsky, a government witness who was a former participant in the Pacelli operation. Lipsky testified, and his testimony was corroborated by other evidence,[6] that 15 of the defendants and 4 of the co-conspirators named in the indictment were participants in the narcotics operations described by Pacelli.[7] Pacelli received co-

caine in kilo or multi-kilo quantities from Juan Serrano. He received heroin in multikilo quantities from Bless and Sperling. He sold cocaine in kilo and multikilo quantities to Bless, Berger, Valentine, Sperling and Bassi. Bless sold heroin and purchased cocaine from Pacelli. He resold the cocaine to co-conspirator Jack Finkelstein. Valentine purchased cocaine from Pacelli and agreed to travel to South America to obtain drugs on behalf of Pacelli and his partners, Perez and Bracer. Juan Serrano sold cocaine to Pacelli who resold it to Sperling. Garcia and Del Busto received from Valentine cocaine which the latter obtained from Pacelli. The evidence showed the participation of Bassi, Berger and Frank Serrano in the narcotics conspiracy directed by Pacelli. In short, witnesses described approximately 47 meetings, conversations and drug sales or transfers beginning in May 1971 and continuing through December 1971 involving members of the Pacelli group.

Evidence concerning the activities of Sperling and the Sperling branch of the conspiracy was adduced primarily through the testimony of Joseph Conforti, a former member of the conspiracy. Conforti's testimony, corroborated by that of Cecile Mileto and Zelma Vance, established that 13 of the defendants and 2 of the co-conspirators named in the indictment were participants in the narcotics operations directed by Sperling.[8] These witnesses described approximately 69 meetings, conversations, drugs sales or transfers beginning in early 1971 and continuing through April 1973 involving members of the Sperling group. As with the Pacelli branch of the conspiracy, each of Sperling's workers had a definite role in the conspiracy, including Goldstein and Schworak who delivered narcotics at Sperling's direction. Sperling supervised and directed the purchase, processing and sale of narcotics within his sphere of control.

II. LIPSKY TESTIMONY

All appellants claim error with respect to the testimony of Barry Lipsky, the principal government witness. They argue

that the court improperly restricted their cross-examination of Lipsky regarding the contents of a letter written by him on December 22, 1972 to Assistant United States Attorney Morvillo (the Lipsky-Morvillo letter); and that they were prejudiced by the failure of the government to make available to them a letter written by Lipsky on December 6, 1972 to Assistant United States Attorney Feffer (the Lipsky-Feffer letter).

Much of the evidence concerning the Sperling-Pacelli narcotics conspiracy was provided by Lipsky. His testimony was critical because, beginning in April 1971 and continuing until February 1972, he was Pacelli's chief assistant in the latter's narcotics business. He received the narcotics purchased by Pacelli; he stored, tested, diluted and repackaged them for distribution; and he delivered them to Pacelli's customers. He also was present with Pacelli during various narcotics transactions.

(A) *Our Prior Decision In United States v. Pacelli*

Before turning to appellants' contentions regarding Lipsky's testimony in the instant case, brief reference should be made to our recent decision in United States v. Pacelli, 491 F.2d 1108 (2 Cir. 1974), which involved testimony by the same government witness Lipsky.

In *Pacelli,* we reversed the conviction of Vincent Pacelli, Jr.[9] of injuring and impeding a witness who had testified before a grand jury and had been subpoenaed by the government as a trial witness in a narcotics case, and also of conspiring with Lipsky to deprive that citizen of her right to be a witness and causing her death. One of the grounds of our reversal and remand for a new trial in *Pacelli* was the government's failure to furnish the defense, as required ;by the Jencks Act, 18 U.S.C. §3500 (1970), with the Lipsky-Morvillo letter (the same one referred to above).[10] This letter described Lipsky's "terrible mental state" for having caused a mistrial by perjuring himself on the witness stand at a previous trial; stated that his main purpose during the

past 9½ months had been to *"try my very best* to assist the Government"; and stated that he *"looked forward eagerly to testifying* in narcotics cases for the Government, *against* Vincent Pacelli, Jr. and others." (emphasis in original) 491 F.2d at 1112. We concluded that the withholding of this letter had impaired cross-examination and had prevented a fair trial.

(B) *Use of Lipsky-Morvillo Letter At Trial Of Instant Case*

The Lipsky-Morvillo letter was given to defense counsel at the trial of the instant case. Appellants nevertheless argue that the court unreasonably restricted their cross-examination of Lipsky regarding the letter and erroneously refused to receive it in evidence. While we fail to understand the need for excluding the Morvillo letter altogether, since any portions of it which were irrelevant to the instant proceeding could easily have been deleted, we do not think the ruling was so prejudicial as to require reversal.

[1,2] Lipsky was questioned at length about the letter. He admitted having falsely stated in it that his untruthful answers at the earlier trials were unintentional. He acknowledged having expressed his appreciation to Morvillo for the help he had received in connection with the murder charge against him in Nassau County. There is no claim that the letter differed in any way from what Lipsky said it contained. The exclusion of the letter itself as an exhibit and the restriction of certain cross-examination of Lipsky regarding the letter was well within the discretion of the court. United States v. Miles, 480 F.2d 1215, 1217 (2 Cir. 1973); United States v. Kahn, 472 F.2d 272, 279-82 (2 Cir.), cert. denied, 411 U.S. 982 (1973).[11]

(C) *Absence Of Lipsky-Feffer Letter At Trial Of Instant Case*

During the trial of the instant case, the government on four separate occasions represented that a search of its files indicated that all of Lipsky's Section 3500 material had been produced. A few months after imposition of sentences in this case, however, and during still another trial at which Lipsky testified (see United States v. Mallah, 503 F.2d 971 (2 Cir. 1974)), the government produced for the first time the Lipsky-Feffer letter referred to above.

[3] Appellants contend that the govenrment's failure to produce this letter for use at the trial of the instant case precluded them from adequately cross-examining Lipsky. They point out that this letter contains new and significant material which could have been used effectively in testing Lipsky's credibility; that it reveals important favors which Lipsky had received from the government in the past and that he hoped for more in the future, none of which was disclosed at the trial; and that the letter, compared with Lipsky's testimony, shows that he tailored his testimony to what he thought the government wanted to hear. Appelants emphasize that Lipsky was the government's key witness and that his testimony was the only incriminating evidence against certain appellants.

[4] The issue presented by the absence of the Lipsky-Feffer letter is entirely different from that dealt with above in connection with the Lipsky-Morvillo letter. Clearly the Jencks Act required the government to produce the Feffer letter for use on cross-examination of Lipsky. While the government has previously characterized its failure to produce such important Jencks Act matrials in connection with other phases of is prosecution of members of the Sperling and Pacelli organizations as a matter of inadvertence, United States v. Pacelli, *supra,* 491 F.2d at 1119, we feel compelled to admonish that we view such failures in the most serious light. Materials as dramatic as the Morvillo and Feffer letters are not like FBI reports lying around in files which a prosecutor could well forget. Compare United States v. Keogh, 391 F.2d 138, 147 (2 Cir. 1968). While the statement in Giglio v. United States, 405 U.S. 150, 154 (1972), that "the prosecutor's office is an entity" should not be carried too far from the issue of prosecutorial promises there *sub judice,* here Assistant United States Attorney Feffer was still

working in that capacity when this case was tried and must have been aware how useful to the defense Lipsky's letter would have been. His failure to make the letter known to the prosecutors at this trial cannot be excused as due to a "breakdown in channels of communication.' " *id.*

[5, 6] Since the government failed to provide significant Jencks Act materials, the test is whether "there was a significant chance that this added item, developed by skilled counsel . . . ., could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v. Miller, 411 F.2d 825, 832 (2 Cir. 1969). See United States v. Houle, 490 F.2d 167, 171 (2 Cir. 1973), cert. denied, 417 U.S. 970 (1974); United States v. Fried, 486 F.2d 201, 202-03 (2 Cir. 1973), cert. denied, 416 U.S. 983 (1974). In applying that test here, it is incumbent upon us to analyze the letter in an effort to determine its potential usefulness on cross-examination of Lipsky and, in the light of that determination, to attempt to evaluate the impact the letter might have had with respect to the case against each appellant in view of the nature and quantum of evidence against each.

As indicated above, the essence of Lipsky's letter to Feffer was that he thanked Feffer for some of the privileges he had arranged, asked for further favors, and discussed the status of the state murder case pending against Lipsky. This letter could have been of value to appellants in three independent ways.

First, it would have supported the thrust of much of the cross-examination of Lipsky to the effect that his testimony was unreliable. Defense counsel had tried to show that he was under the domination of the government and axious to please the government in order to obtain certain privileges. As to this, the letter would have been significant because it contained expressions of Lipsky's appreciation for some of the favors for which the government had been responsible in the past—or so Lipsky thought—in return for his cooperation and testimony.[12] These special considerations which Lipsky had received, apparently at

the request of the government, reflect at least a rapport between Lipsky and the prosecutor's office.

A second and closely related aspect of the letter which might have been helpful to the defense was Lipsky's request for future favors from the government. For example, he asked Feffer to make arrangements, in the event he were convicted on the state murder charge, so that he would not be required to serve his sentence in a state penitentiary. He also asked Feffer to arrange for a private meeting between Lipsky and his girl friend in Feffer's office.[13] At trial, although Lipsky was asked what considerations he expected in return for his testimony, he never specifically mentioned those just stated.

A third aspect of the letter which might have been useful in cross-examining Lipsky was his description of the status of the state murder charge pending against him. At the trial of the instant case, Lipsky had indicated a rather carefree attitude about the state proceeding and a lack of concern as to whether the federal government would intercede on his behalf. On cross-examination, for example, he testified that he may not have asked his lawyer to obtain a reduced plea for him; that he did not really want it because his lawyer thought he would be acquitted. He indicated ignorance of the federal government's role in obtaining a reduced plea of manslaughter. In contrast to his trial testimony, Lipsky stated in his letter to Feffer that the state case against him was "an open and shut case with me the loser"; that the state had approximately "47 witnesses to appear against me"; that the "entire D.A.'s office out here is out for my blood and my life, (which they mean to have)"; that the District Attorney "opposed any conference or plea"; and that his attorney was reduced to "trying to dream up some sort of defense for me in this trial."

In the context of the record in the instant case, however, more than an analysis of the letter in the abstract is required before we can determine whether there was a significant chance that its use at trial could have induced sufficient reasonable doubt in the minds of the jurors to have changed the result of the verdicts.

Cross-examination of Lipsky by 10 defense counsel covers more than 400 pages of the trial transcript. On both direct and cross, he admitted that he had testified falsely before a Florida grand jury in 1970; that he had lied to FBI agents in Florida; that he had been convicted in Miami of conspiracy to transport stolen securities in interstate commerce; that he had lied to the federal judge in Florida who placed him on probation; that he had lied to a Nassau County Assistant District Attorney in 1972; and that at two trials involving Pacelli in the Southern District of New York in June and December of 1972 he had testified falsely about promises that had been made to him. He also admitted that he used cocaine; that he had received promises that he would not be prosecuted for his narcotics activities; that he did not expect to be prosecuted for perjury or tax evasion; that he was hopeful that the federal government would exert its influence in Nassau County to help him receive a lighter sentence on his manslaughter guilty plea; and that he appreciated the help the United States Attorney's office had given in connection with that sentence. Moreover, the jury's attention repeatedly was directed to the Lipsky-Morvillo letter.

Also, in contrast to the sitution in *Pacelli*, although Lipsky was the principal witness at the trial of the instant case, other accomplice witnesses also testified. This accomplice testimony was corroborated by an abundance of other independent evidence, including documents, seized drugs, photographs, a tape recording, the results of police surveillance and an undercover investigation, and the testimony of many disinterested witnesses. Furthermore, Lipsky's testimony itself was corroborated here with far more precision than it had been at the *Pacelli* trial.

(D) *Evaluation Of Possible Impact Of Lipsky-Feffer Letter on Cases Against Respective Appellants*

Having in mind the foregoing analysis of the Lipsky-Feffer letter and particularly the context of other impeaching evidence in which the letter, if available, might have been used to cross-

examine Lipsky, we turn now to an evaluation of the impact that the letter might have had with respect to the cases against the respective appellants in view of the nature and quantum of evidence against each.

[7] This evaluation relates primarily to the evidence in support of the convictions of all appellants on the conspiracy count, Count One. We find insufficient evidence, other than Lipsky's testimony, to sustain the convictions of any of the appellants for possession and distribution of cocaine and heroin as charged in substantive Counts Three through Ten; indeed, we do not understand the government to claim that there is any evidence to corroborate Lipsky's testimony as to these counts. We therefore reverse and remand for a new trial the convictions of all appellants on substantive Counts Three through Ten.[14]

Accordingly, unless otherwise stated, the following analysis of the impact of the Lipsky-Feffer letter upon the cases against the respective appellants relates to their convictions on the conspiracy count.

(1) SPERLING, GOLDSTEIN and SCHWORAK

[8] Based on our careful review of the evidence introduced against Sperling, Goldstein and Schworak, we are satisfied that, even if the Lipsky-Feffer letter had been available at the time, it would have had no effect whatever upon the jury's verdict as to these appellants on Count One.

Virtually all of the evidence participation in the narcotics enterprise was adduced through the testimony of the witnesses Conforti, Mileto and Vance, corroborated by electronic and visual surveillance. Moreover, Sperling's conviction of engaging in a continuing criminal enterprise involving hard narcotics was based on evidence wholly independent of Lipsky's testimony.

These appellants nevertheless advance what we find to be the untenable contention that Lipsky's allegedly *uncorroborated* testimony was the *only* evidence to support their convictions. They claim that Lipsky's testimony was all there was to link the

Pacelli and Sperling narcotics operations. This claim misconstrues the evidence. While Lipsky did testify to four specific narcotics transactions between the Pacelli and Sperling groups,[15] his testimony with respect to these four transactions was more than amply corroborated. Furthermore, there was evidence entirely independent of Lipsky's testimony that established the close relationship between the Pacelli and Sperling operations.

For example, Lipsky testified that he and Pacelli frequently went to Ballantine Hair Stylists (Ballantine's) near 54th Street and Seventh Avenue in Manhattan. This barbershop was the nerve center of Sperling's operations. It became the focus of intensive policy surveillance. Lipsky testified that in November 1971 he and Pacelli drove to 55th Street and Sixth Avenue where Pacelli parked the car and left. When Pacelli returned, he gave Lipsky a parking claim check and a set of car keys. He instructed Lipsky to go to a nearby garage and pick up a late model car, in the trunk of which would be two kilos of heroin. Lipsky was further instructed by Pacelli to drive the car to the "stash", store the drugs there, return the car to the garage, and then meet Pacelli at Ballantine's.

Lipsky testified that he did as he was directed. After picking up the car, he drove to Weyl's apartment which was the "stash". He removed a bag from the car trunk. When he opened the bag in the apartment, he found inside four half-kilo bags of heroin which he put away. He then returned the car and met Pacelli who was engaged in conversation with Sperling. Later that evening, Lipsky obtained $20,000 at Pacelli's request from Pacelli's aunt. Lipsky and Pacelli then drove to Spring Street. Pacelli left the car and returned. He told Lipsky that he had given Sperling $20,000 and that he planned to pay him an additional $14,000 or $16,000 which he owed him.[16]

Lipsky further testified that he participated in another narcotics transaction in December 1971. This involved Pacelli's sale to Sperling of a kilo of cocaine which initially had been purchased from Juan Serrano. According to Lipsky, the events which

culminated in this sale began when he and Pacelli drove to a tavern where Pacelli said he was to meet Sperling. Pacelli entered the bar and shortly thereafter returned with $12,000. They drove to Shakespeare Avenue in the Bronx where Pacelli entered Juan Serrano's house. A short time latter, Lipsky saw Juan Serrano leave the house, get into a car and drive away. Within a few minutes, Juan Serrano returned. Pacelli then rejoined Lipsky, removed a large bag from under his coat and told Lipsky to examine it. Pacelli then instructed Lipsky to go to Weyl's apartment, to repackage the cocaine into two bags containing 476 grams each and to store the excess.

After completing this assignment, Lipsky was directed by Pacelli to place the cocaine in the trunk of the same new car that had been used during the previous transactions. The car was parked in the same garage. After doing so, Lipsky returned the keys to Pacelli at Ballantine's. Pacelli gave them to Sperling. That same evening, Pacelli and Lipsky drove to Spring Street where Pacelli collected $4,000 from Sperling. This was Pacelli's profit on the cocaine transaction.[17]

Such testimony showed the interrelationship of the Pacelli and Sperling groups. It was corroborated by other evidence. Susan Weyl, for example, testified that, with her permission, Lipsky and Pacelli used her apartment as a "stash" where they stored heroin and cocaine. She testified that during October and November of 1971 Lipsky from time to time entered her apartment bringing packages of narcotics and that he removed one or more such packages from her apartment.

Pacelli testified that he visited Sperling's apartment on Spring Street and visited Juan Serrano's house on Shakespeare Avenue in December 1971. He met frequently with Sperling at Ballantine's. He also testified that he knew Mileto and Goldstein, two of Sperling's co-workers, and that at his direction Lipsky purchased two savings bonds for Sperling's children, Lipsky using a fictitious name.

Moreover, Sperling testified that he had met with Pacelli on 35 to 40 occasions. He was photographed on at least one of

these occasions by police. Juan Serrano also testified that Pacelli had visited him during this period at his house on Shakespeare Avenue.

Aside from this corroborating testimony, police surveillance confirmed the close relationship between the Pacelli and Sperling groups. On May 8, 1972, for example, Sperling was observed talking with Perez, one of Pacelli's partners, in front of Ballantine's. Standing nearby were Lombardi, one of Sperling's workers, and Ramirez, one of Pacelli's workers. Eventually Sperling left with Perez, Lombardi with Ramirez. Photographs of this meeting were received in evidence.

[9] In short, we are left with the firm conviction that, in view of the substantial, independent and corroborating evidence linking the Pacelli and Sperling narcotics operations, the availability of the Lipsky-Feffer letter for use on cross-examination of Lipsky would not have had any effect on the jury's verdict with respect to the conspiracy convictions of Sperling,[18] Goldstein and Schworak,[19] including their participation in the Pacelli-Sperling conspiracy.

(2) JUAN SERRANO

[10] Turning to the conspiracy evidence against Juan Serrano, Lipsky testified that he initially was introduced to Juan by Pacelli during the summer of 1971 at the Hippopotamus Discotheque in Manhattan. Pacelli told Lipsky that he had known Juan for a long time. One evening, Juan gave Lipsky a ride home on his motorcycle. About a week later, Pacelli informed Lipsky that they were going to the Bronx to see whether Juan would supply some cocaine. Pacelli and Lipsky drove to Juan's home on Shakespeare Avenue and purchased cocaine from Juan.

There was corroboration of Lipsky's testimony about this sale and about Juan's role in the conspiracy. Juan testified that he knew Pacelli and Febre who was a member of the Pacelli operations; that he had met with them and Lipsky at the

discotheque; and that he had given Lipsky a ride home on his motorcycle on the night referred to in Lipsky's testimony.[20] Juan also testified that Pacelli hads visited him at his home in December 1971—a visit confirmed by Pacelli's testimony. Under cross-examination, Juan admitted that he had lied at the time of his arrest when he denied knowing Pacelli. Photographs were received in evidence which linked Pacelli, Febre and Juan Serrano.

We hold, in view of this and other evidence which established Juan Serrano's unmistakable role in the conspiracy, that there was no significant chance that the use of the Lipsky-Feffer letter by skilled defense counsel would have had any effect upon the jury's verdict as to him.

(3) VALENTINE, DEL BUSTO and GARCIA

[11] We direct our attention next to the evidence against Valentine, Del Busto and Garcia. Lipsky testified that Valentine, who was a friend of Perez and Bracer (both of whom were partners of Pacelli), agreed to travel to South America on behalf of Pacelli to obtain narcotics. While waiting to leave for South America, Valentine persuaded Lipsky to sell him cocaine for resale. On September 28, 1971, at Yellowfingers Cafe, Valentine, Pacelli and Lipsky arranged for the sale of this cocaine. Lipsky hasd obtained it from a stash and had placed it in a partially damaged 1969 blue Pontiac. The cocaine eventually was transferred to Valentine.

Lipsky's activities in delivering this cocaine to Valentine had been observed by the police. Lipsky's testimony was corroborated by the testimony of officers who had observed the pickup of the Pontiac by Lipsky; the return to Valentine of the car containing cocaine; and Valentine's transfer of the car to co-conspirator Gonzalez.

There was other independent evidence of Valentine's involvement in the narcotics conspiracy when, on October 18, he par-

ticipated with Gonzalez, Del Busto and Garcia in further transferring this cocaine. Indeed, the evidence of this transfer also indicates that the convictions of Del Busto and Garcia are supported by substantial evidence completely independent of Lipsky's testimony.

[12] On October 18, Officer Crowe of the New York City Police Department observed Valentine enter the Castillian Room Bar & Grill. Parked nearby was the same blue Pontiac. A few minutes later, Del Busto and Garcia left the Castillian Room and went to the car. Garcia opened the trunk, removed a newspaper-wrapped package and handed it to Del Busto who placed it inside the right side of his jacket. Del Busto got into another car and was arrested several blocks away. The newspaper-wrapped package containing 303.5 grams of cocaine was found in his right inside jacket pocket.[21] Meanwhile, Garcia returned to the Castillian Room and left with Valentine and Gonzalez. The three went together to the trunk of the same blue Pontiac, from which Gonzalez took out a bag containing boric acid. This was found to be the substance used to dilute the cocaine which was seized from Del Busto.

We hold that the convictions of Valentine, Del Busto and Garcia on the conspiracy count, as well as on substantive Count Eleven, are supported by evidence wholly independent of Lipsky's testimony. The Lipsky-Feffer letter, had it been available, would have had no effect upon their convictions.

(4) BLESS

[13] As for the conspiracy evidence against Bless, Lipsky testified about a number of narcotics transactions between himself and Pacelli on the one hand, and between himself and Bless on the other. He also testified that Bless had told him that he and his brother, Edward Bless, were "partners in the narcotics business". We find that Lipsky's testimony in this respect was corroborated by other evidence.

Lipsky testified that Pacelli instructed him to meet Perez so

that they could arrange to obtain two kilos of heroin from Bless. Lipsky did meet Perez. Together they drove to a location where they found Bless, his brother Edward and Ramirez waiting. Lipsky saw Bless give somthing to Perez. Lipsky then received from Perez a parking claim ticket and a set of car keys. Perez told Lipsky to go to a certain garage; obtain a car which would have two kilos of heroin in the trunk; take the narcotics to the stash (Weyl's apartment); return the car; and then give the keys and another claim check to Pacelli. Lipsky did as directed. He confirmed that the car contained heroin.

Lipsky also testified that during the summer of 1971 he sold two kilos of cocaine to Bless. He obtained the cocaine from Weyl's aspartment and deliver it by the familiar method of transferring a car.

Lipsky's testimony regarding Bless' narcotics transactions and his role in the conspiracy was corroborated, in addition to the foregoing, by significant other evidence. For example, Susan Weyl testified that her apartment was used as a stash and cutting mill at this time. Jack Finkelstein testified that during this period he purchased twenty to thirty kilos of cocaine from Bless and that Bless delivered it himself. Finkelstein further testified that Bless agreed to accept to accept the return of two kilos of cocaine which he had sold to Finkelstein; and that Bless sent Lipsky to Finkelstein's apartment to pick up the cocaine to be returned.

[14] This and other evidence adequately corroborated Lipsky's testimony regarding Bless' role in the conspiracy.[22] We hold that there was no significant likelihood that the Lipsky-Feffer letter would have affected the jury's verdict as to Bless.

(5) BASSI, BERGER and FRANK SERRANO

[15] We come finally to the conspiracy evidence against Bassi, Berger and Frank Serrano. We find that the evidence against these three, compared with that against the other eight, is on

quite a different footing from the standpoint of the impact that the Lipsky-Feffer letter might have had if it had been available to cross-examine Lipsky.

For example, while there was corroboration for Lipsky's testimony that Bassi's apartment was a stash for some Pacelli-Sperling narcotics transactions, there also was evidence sharply disputing his testimony that he attempted to deliver cocaine to Bassi on Christmas Day in 1971. Such contradicting testimony came from Bassi's brother, Edward Bassi, and from the sister of Bassi's wife.

As for Berger, Lipsky's testimony linking him to the conspiracy was uncorroborated except for the evidence that Berger went to Spain for an ambiguous purpose.

And the only evidence that Frank Serrano was a narcotics dealer was the uncorroborated testimony of Lipsky.

In view of the nature and quantum of the conspiracy evidence against these three appellants, we cannot say that the Lipsky-Feffer letter, had it been available, would not have affected their convictions.

(E) Summary Of Impact Of Lipsky-Feffer Letter On Cases Against Respective Appellants

With respect to the conspiracy convictions of Sperling, Goldstein, Schworak, Juan Serrano, Valentine, Del Busto, Garcia and Bless, we hold that there was no significant chance that the Lipsky-Feffer letter, had it been available, "could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v. Miller, *supra,* 411 F.2d at 832. This conclusion is based upon our careful examination of the entire record of more than 4000 pages; and it is based upon our evaluation and balancing, among other things, of the enormous amount of other material that was available and used to impeach Lipsky, the extensive cross-examination of him by defense counsel, and the substantial evidence that corroborated

his testimony. See United States v. Pfingst, 490 F.2d 262, 276-78 (2 Cir. 1973), cert. denied, 417 U.S. 919 (1974); United States v. Kahn, 472 F.2d 272, 287-88 (2 Cir. 1973). We therefore affirm the conspiracy convictions of Sperling, Goldstein, Schworak, Juan Serrano, Valentine and Bless. For the reasons stated below under Section III, however, we reverse the conspiracy convictions of Del Busto and Garcia on other grounds.

With respect to Bassi, Berger and Frank Serrano, however, application of the same test leads us to the conclusion that the Lipsky-Feffer letter, had it been available, might well have affected the jury's verdict as to them. We therefore reverse their conspiracy convictions[23] and remand their cases for a new trial.

III. SINGLE CONSPIRACY

Goldstein, Juan Serrano, Valentine, Del Busto and Garcia[24] claim that there was a material variance between the single conspiracy charged in the indictment and the multiple conspiracies said to have been proven; that the court improperly instructed the jury on the single conspiracy issue; that the court abused its discretion in denying their motions for severance; and that, even if there was proof of a single conspiracy, the evidence was insufficient to support their conspiracy convictions.

[16, 17] With respect to the claim of variance, we hold that the evidence clearly established the existence of one large conspiracy to distribute enormous amounts of heroin and cocaine for profit. The common aim and ultimate purpose of the conspiracy was "the placing of the forbidden commodity into the hands of the ultimate purchaser." United States v. Agueci, 310 F.2d 817, 826 (2 Cir. 1962), cert. denied, 372 U.S. 959 (1963). There was abundant evidence that Pacelli and Sperling joined together in an integrated loose-knit combination, United States v. Bynum, 485 F.2d 490, 495 (2 Cir. 1973), vacated and remanded on other grounds, 417 U.S. 903 (1974), to purchase and sell large quantities of heroin and cocaine at a profit. At the core of

this joint combination were Sperling and his partner, Mallah, as well as Pacelli and his partners, Perez and Bracer. Substantial trial testimony, corroborated by visual surveillance, amply proved an integrated and continuing conspiracy between the Pacelli and Sperling groups. Each acted as customer and supplier of the other. The fact that not each of the conspirators was acquainted with each of the others is of no significance, since "there is evidence that each was aware of others in the line of distribution and of the larger nature of the operation in which he . . . played a part." United States v. Calabro, 467 F.2d 973, 982-83 (2 Cir. 1972), cert. denied, 410 U.S. 926 (1973). See United States v. Sisca, 503 F.2d 1337, 1345 (2 Cir. 1974), cert. denied, ——U.S.—— (1974); United States v. Bynum, *supra*, 485 F.2d at 496.

In view of the frequency with which the single conspiracy vs. multiple conspiracies claim is being raised on appeals before this court, see United States v. Rizzo, 491 F.2d 1235 (2 Cir. 1974); United States v. DeMarco, 488 F.2d 828 (2 Cir. 1973); United States v. Mapp, 476 F.2d 67 (2 Cir. 1973), we take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government's having prosecuted the offenses here involved in one rather than two conspiracy trials.[25] On the contrary, many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself. We have already alluded to

our problems at the appellate level, where we have had to comb through a voluminous record to give adequate consideration to the claims of eleven separate appellants.[26]

[18] We hold that Judge Pollack's charge on this issue clearly was appropriate and not contrary to our decision in United States v. Borelli, 336 F.2d 376, 386 (2 Cir. 1964), cert. denied, 379 U.S. 960 (1965). He properly marshalled the evidence; explained in detail the essential element of the crime of conspiracy; focused the jury's attention on the importance of their determining whether each defendant joined the conspiracy and the scope of his agreement; and specifically charged that if the government "has failed to prove the existence of only one conspiracy, you must find the defendants not guilty." This instruction was proper—"indeed, if anything, more favorable to appellants than that to which they were entitled." United States v. Sisca, *supra*, 503 F.2d at 1345. See United States v. Calabro, 449 F.2d 885, 893-94 (2 Cir. 1971), cert. denied, 405 U.S. 928 (1972); United States v. Aiken, 373 F.2d 294, 299 (2 Cir.), cert. denied, 389 U.S. 833 (1967). Assuming arguendo that the evidence did show more than one conspiracy, there was no prejudice to appellants sufficient to warrant reversal under the rule stated in United States v. Agueci, *supra*, 310 F.2d at 827. See United States v. Calabro, *supra*, 467 F.2d at 983.

[19] We would like to note, however, that the charged based on Pinkerton v. United States, 328 U.S. 640, 645 (1946), here given to the jury by Judge Pollack,[27] should not be given as a matter of course. While no appellants in this case were prejudiced by the charge,[28] it was used here in circumstances quite different from those that gave it birth. In the *Pinkerton* case, there was no evidence that Daniel Pinkerton had committed the substantive offense for which he had been convicted, but it was clear that the offense had been committed and that it had been committed in furtherance of an unlawful conspiracy of which he was a member. Daniel's conviction on the substantive count was sustained because "in the law of conspiracy . . . the overt act of

one partner in crime is attributable to all." *Id.* at 647. In this case, however, the inverse is at work. The evidence of various substantive offenses, many discrete instances of which are charged to individual appellants in Counts Two through Eleven, was great; it was the conspiracy that in some instances must be inferred largely from the series of criminal offenses committed.

[20] We hold that appellants' claim that the court abused its discretion in denying their motions for severance is without merit. In view of the more than adequate evidence of the existence of a single conspiracy, the court did not abuse its discretion in denying the motions for severance. United States v. Bynum, *supra*, 485 F.2d at 497-98; United States v. Cassino, 467 F.2d 610, 622-23 (2 Cir. 1972), cert. denied, 410 U.S. 928 (1973); United States v. Fantuzzi, 463 F.2d 683, 687 (2 Cir. 1972).

[21] Finally, we turn to the claim that, assuming the evidence established a single conspiracy, there was insufficient evidence from which the jury could have concluded that appellants were aware that the scope of the conspiracy was larger than their participation as respective individuals. As to appellants Goldstein, Juan Serrano and Valentine, we hold that their claims in this respect are frivolous. There was overwhelming proof that these appellants were deeply involved in this large scale narcotics conspiracy and were well aware of its scope. United States v. Arroyo, 494 F.2d 1316, 1319 (2 Cir. 1974); United States v. Bynum, *supra,* 485 F.2d at 496-97, 498-99.

[22, 23] On the other hand, the claims of appellants Del Busto and Garcia are on a different footing. As to them, the government relies upon the single act doctrine in urging that there was sufficient evidence to support their conspiracy convictions. We disagree. "For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotics laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which such

knowledge may be inferred." United States v. De Noia, 451 F.2d 979, 981 (2 Cir. 1971), citing United States v. Agueci, *supra,* 310 F.2d at 836, and United States v. Aviles, 274 F.2d 179, 189b (2 Cir.), cert. denied, 362 U.S. 974 (1960). Here, the narcotics transaction of October 18, 1971 involving Valentine, Del Busto, Garcia and Gonzalez we believe is insufficient to link Del Busto and Garcia to the larger conspiracy. Garcia's mere delivery of cocaine to Del Busto, under all the circumstances, is not the kind of single transaction which itself supports an inference of knowledge of a broader conspiracy on the part of both participants. United States v. De Noia, *supra,* 451 F.2d at 981, and authorities there cited.

[24] This does not end our inquiry as to the judgments of conviction of Del Busto and Garcia. Assuming the insufficiency of the evidence to support their convictions on the conspiracy count, we nevertheless hold that they were not prejudiced by the submission of that count to the jury. As we have held above, there was overwhelming evidence to support their convictions on Count Eleven, the substantive count which charged them with distributing and possessing with intent to distribute 303.5 grams of cocaine. Since they were not prejudiced by a "spill over" of the evidence from the submission of the conspiracy count to the jury, United States v. Gaines, 460 F.2d 177, 178-80 (2 Cir. 1972); United States v. Adcock, 447 F.2d 1337, 1339 (2 Cir.), cert. denied, 404 U.S. 939 (1971), we hold that the valid convictions on the substantive count (Count Eleven) provide an adequate basis upon which to affirm the judgments of conviction of both Del Busto and Garcia on that count. United States v. DeNoia, *supra,* 451 F.2d at 981; United States v. Coppola, 424 F.2d 991, 994-95 (2 Cir.), cert. denied, 399 U.S. 928 (1970); United States v. Tropiano, 418 F.2d 1069, 1083 (2 Cir. 1969), cert. denied, 397 U.S. 1021 (1970); United States v. Marino, 396 F.2d 780, 781 (2 Cir. 1968); United States v. Agueci, *supra,* 310 F.2d at 828.

[25, 26] Since Del Busto and Garcia received concurrent sentences on the two counts and since the fact of conviction on

both counts might have affected the sentences imposed for each, we remand for reconsideration of sentencing. See United States v. Rizzo, 491 F.2d 1235, 1236 (2 Cir. 1974); United States v. DeMarco, 488 F.2d 828, 833 (2 Cir. 1973); United States v. Mancuso, 485 F.2d 275, 283 (2 Cir. 1973); United States v. Mapp, 476 F.2d 67, 83 (2 Cir. 1973); United States v. Hines, 256 F.2d 561, 564 (2 Cir. 1958). Cf. United States v. Febre, 425 F.2d 107, 113 (2 Cir.), cert. denied, 400 U.S. 849 (1970). In so doing, however, we intimate no view as to the propriety of changing the sentences on the substantive counts. In short, as to Del Busto and Garcia, we reverse their convictions on Count One, affirm their convictions on Count Eleven, and remand for reconsideration of sentencing on the latter count.[29]

IV. CONTINUING CRIMINAL ENTERPRISE

Sperling was convicted on Count Two of engaging in a continuing criminal enterprise involving hard narcotics in violation of 21 U.S.C. §848 (1970). He claims that his conviction on this count should be reversed chiefly on the grounds that §848 is unconstitutional; that the evidence was insufficient to support the conviction; and that the indictment was legally deficient.[30]

[27] Sperling's claim that the continuing criminal enterprise provision of §848 on it face is void for vagueness is foreclosed by our decisions in United States v. Sisca, *supra*, 503 F.2d at 1345, and United States v. Manfredi, 488 F.2d 588, 602-03 (2 Cir. 1973), cert. denied, 417 U.S. 936 (1974). We also reject his claims that the statute is unconstitutional as applied to him, that the evidence was insufficient to support his conviction under the statute and that the indictment was legally deficient.

[28] To establish a violation of §848, it was incumbent upon the government to prove that Sperling occupied a position as organizer or a managerial or supervisory position with respect to a continuing narcotics trafficking operation in concert with five or more other persons, and that he received substantial income or resources from the operation.

[29] The record shows that Sperling was the operational kingpin of a highly organized, structured and on-going narcotics network. Testimony by Conforti, Cecile Mileto and Vance, as well as visual and electronic surveillance, clearly established that during the period from May 1, 1971 through April 13, 1973 Conforti, Louis Mileto, Goldstein, Schworak, Spada and many others were engaged in Sperling's narcotics enterprise directly under his supervision. There was evidence that on more than 26 occasions some or all of these individuals mixed heroin for Sperling. Each of these mixing sessions involved possession, diluting and distributing from a half kilo to three kilos of pure heroin. Such evidence was more than sufficient to sustain his conviction under this count.[31]

[30] Sperling further argues that the evidence was insufficient to convict him under §848 because it failed to show that five or more people were working in his narcotics business at the same moment. This argument misconstrues the statute. No such proof is required. As to this element of the offense, the statute requires only that the person charged must have been acting "in concert with five or more other persons" and as to them that he occupied "a position of organizer, a supervisory position, or any other position of management".

[31] In like vein, Sperling's claim that the indictment was legally deficient is little short of fatuous. He asserts that Count Two was defective because it failed to specify the names of the perons with whom he acted in concert and as to whom he occupied a position of organizer, and because it failed to specify each violation constituting the continuing series of violations proscribed by the statute. These contentions are wholly devoid of merit. Count Two tracks the statutory language. It contains every element of the offense charged. It satisfies the requirement that a defendant be given notice of the charges against him so that he can prepare his defense and plead the judgment in bar of any future prosecution for the same offense. United States v.

Salazar, 485 F.2d 1272, 1277 (2 Cir. 1973). Moreover, Sperling was provided with a bill of particulars which identified eight persons as to whom he occupied a position of organizer, supervisor or manager.

In short, we reaffirm that §848 is aimed at "the business of trafficking in the prohibited drugs on a continuing, serious, widespread, supervisory and substantial basis." United States v. Manfredi, *supra*, 488 F.2d at 602. The indictment as amplified by the bill of particulars made it crystal clear to Sperling that this was the nature of the government's case and afforded him an opportunity fairly and adequately to prepare his defense. His conviction on Count Two is affirmed.[32]

We have considered appellants' other claims of error and find them without merit.

[32] To summarize:

On Count One, we affirm the convictions of appellants Sperling, Goldstein, Bless, Juan Serrano, Valentine and Schworak; we reverse and remand for a new trial the convictions of appellants Bassi, Berger and Frank Serrano, and we reverse the convictions of appellants Del Busto and Garcia.[33]

On Count Two, we affirm the conviction of appellant Sperling.

On Counts Three through Ten, we reverse and remand for a new trial the convictions of appellants Sperling, Bless, Juan Serrano and Frank Serrano to the extent they were convicted on those counts.

On Count Eleven, we affirm the convictions of appellants Valentine, Del Busto and Garcia.

FOOTNOTES

1. Unless otherwise stated, appellant Jack Bless will be referred to as Bless. When we refer to his brother, Edward Bless, we shall so state. Edward Bless, a co-defendant, was acquitted by the jury. See note 2, *infra*.

Likewise, unless otherwise stated, appellants Herbert Sperling and Frank Bassi, Jr. will be referred to as Sperling and Bassi, respectively, as distinguished from co-defendants Cecile Sperling and Antoinette Bassi who were acquitted by the jury. See note 2, *infra*.

2. In addition to the 11 appellants whose appeals are before us, the indictment named 17 other defendants. Of these, motions for judgments of acquittal were granted as to Salvator Ruggiero and Sam Kaplan; Susan Weyl and Joseph Confroti pleaded guilty to the conspiracy count (Count One) early in the trial; Ben Mallah, Ismael Torres, Peter Salanardi, Courtland Sample, Albert Perez, Al Bracer, Edgardo Ramirez and Jack Spada were unavailable for trial; and Edward Bless, Cecile Sperling and Antoinette Bassi were acquitted by the jury.

3. Appellants were sentenced as follows:

Sperling — Life imprisonment on Count 2; 30 years on Counts 1, 8, 9 and 10 (concurrent); 6 years special parole; $100,000 fine on Count 2 and $200,000 fine on all other counts.

Goldstein — 8 years on Count 1; 3 years special parole; $25,000 fine.

Bless — 10 years on Counts 1, 4, 5 and 6 (concurrent); 3 years special parole; $25,000 fine on all counts.

Juan Serrano — 12 years on Counts 1, 7 and 10 (concurrent); 6 years special parole; $50,000 fine on all counts.

Bassi — 12 years on Count 1; 6 years special parole; $50,000 fine.

Berger — 3 years on Count 1; 3 years special parole; $10,000 fine.

Frank Serrano — 5 years on Counts 1 and 3 (concurrent); 6 years special parole; $5,000 fine on both counts.

Valentine — 12 years on Counts 1 and 11 (concurrent); 6 years special parole; $50,000 fine on both counts.

Del Busto — 5 years on Counts 1 and 11 (concurrent); 3 years special parole; $10,000 fine on both counts.

Garcia — 10 years on Counts 1 and 11 (concurrent); 6 years special parole; $25,000 fine on both counts.

Schworak — 8 years on Count 1; 3 years special parole; $10,000 fine.

Sperling, Bless, Bassi, Valentine, Del Busto, Garcia and Schworak are serving their sentences. Goldstein, Juan Serrano, Berger and Frank Serrano have been enlarged on bail pending appeal.

4. The conspiracy count (Count One) charged a conspiracy to violate provisions of the Comprehensive Drug Abuse Prevention And Control Act of 1970 (the Drug Control Act of 1970), 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A) (1970). These are the statutory provisions upon which the offenses charged in the substantive counts (Counts Three through Eleven) are based. See note 5, *infra.*

The conspiracy count also charged that the co-conspirators conspired to violate 26 U.S.C. §§4705(a) and 7237(b) (1964). These two sections were repealed by the Drug Control Act of 1970, Pub.L.No. 91-513 §§1101(b)(3)(A), 1101(b)(4)(A), 84 Stat. 1292 (1970). The repealer, which became effective on May 1, 1971, contained a saving provision, §1103(a), pursuant to which prosecution for any violations of law which occurred prior to the effective date of repeal are not affected by the repeal. See United States v. McCall, 489 F.2d 359, 360 n. 1 (2 Cir. 1973); United States v. Ross, 464 F.2d 376, 378-80 (2 Cir. 1972).

5. The substantive counts (Counts Three through Eleven) each charged distribution and possession with intent to distribute hard narcotics in violation of the above provisions of the Drug Control Act of 1970 as follows:

* * *

Count 8 Sperling, Cocaine (1 kilo), July 1971;

* * *

Count 9 Sperling, Cocaine (1 kilo), November 1971;

* * *

Count 10 Sperling, Cocaine (1 kilo), December 1971;

* * *

6. In addition to the testimony of Lipsky who was named as a co-conspirator in the indictment, there was accomplice testimony by defendants Conforti and Weyl. Defendants Sperling, Juan Serrano, Berger, Valentine and Pacelli also trestified. There was testimony by Jack Finkelstein who had drug transactions with Lipsky and Bless; Cecile Mileto, wife of co-conspirator Louis Mileto; and Zelma Vance, Mileto's girl friend. Police officers testified regarding their visual surveillance of defendants. Photographs and legally intercepted conversations were received in evidence.

7. The following were identified primarily as members of the Pacelli branch of the conspiracy; defendants Pacelli, Bless, Edward Bless, Juan Serrano, Bassi, Antoinette Bassi, Perez, Berger, Bracer, Frank

Serrano, Ramirez, Valentine, Del Busto, Garcia and Weyl; and co-conspirators Nicholas Lipsky, Peter Aponte, Alberto Gonzalez and Lipsky.

8. The following were identified primarily as members of the Sperling branch of the conspiracy: defendants Sperling, Mallah, Goldstein, Cuccinello, Torres, Salanardi, Sample, Conforti, Kaplan, Cecile Sperling, Ruggiero, Spada and Schworak; and co-conspirators Louis Mileto and Carlo Lombardi.

9. This is the same Vincent Pacelli, Jr. who was named as a defendant in the instant indictment and whose case was severed during the trial. See note 2, *supra.*

10. Regarding the unavailability of the Lipsky-Morvillo letter for purposes of cross-examination in *Pacelli,* we stated:

"Accepting the government's assertion that these nondisclosures were inadvertent, we cannot agree with its characterization of them as 'harmless error.' Although appellant's counsel possessed an abundance of impeaching material which he exploited at trial, none of this information conveyed quite so forcefully as Lipsky's letter to Morvillo the desperate state of Lipsky's mind after he had caused a mistrial by perjuring himself in the previous narcotics prosecution against Pacelli. The letter, furthermore, contains a blatant lie to the effect that his perjury, which caused the mistrial, had been unintentional rather than deliberate. Appellant's counsel would probably have sought to make this letter the 'capstone' of his attack on Lipsky's credibility, cf. United States v. Miller, *supra,* and argued that it revealed a frantic—even mentally disturbed—person who was ready to save himself from a murder conviction in the state court. Denial of the opportunity to use such forceful impeaching material bearing on the credibility of the government's key witness mandates a new trial." (footnotes omitted) 491 F.2d at 1119.

11. We likewise find no merit in appellants' argument that the court erroneously excluded from evidence tape recordings of conversations between an Assistant United States Attorney and Lipsky's attorney. The court acted well within its discretion in refusing to admit them in evidence or to permit testimony regarding them. United States v. Kahn, *supra,* 472 F.2d at 279-82.

12. Lipsky, who at the time was incarcerated in a state facility awaiting trial on the murder charge, wrote in the letter to Feffer:

"I want you to know I appreciate your efforts in securing for me, the room by myself, the TV, and the radio and all the other special features I enjoy here. Without your help I'd be rotting in a dirty cell with no privileges whatsoever."

13. From the letter it would appear that Feffer had already arranged for such visits between Lipsky and his mother and brother, and that he indicated to Lipsky that such a visit with his girl friend could be arranged.

14. In view of the concurrent sentences on the conspiracy count (Count One) imposed on those appellants whose convictions on the substantive counts we reverse while sustaining these convictions on the conspiracy count (Sperling as to Counts Eight, Nine and Ten; Bless as to Counts Four, Five and Six; and Juan Serrano as to Counts Seven and Ten), we remand the cases of these appellants for reconsideration of sentencing on the conspiracy count—for the same reason as we remand below the cases of Del Busto and Garcia for reconsideration of sentencing them on Count Eleven and with the same admonition that we intimate no view as to the propriety of changing the sentences of the four above named appellants on the conspiracy count.

For the reasons stated below, we affirm the conviction of Sperling of engaging in a continuing criminal enterprise (Count Two) and we affirm the convictions of Valentine, Del Busto and Garcia of possessing and distributing cocaine as charged in substantive Count Eleven.

15. The four transactions were these: (1) Sperling bought one kilo of cocaine from Pacelli in July 1971 (Count Eight); (2) Pacelli bought two kilos of heroin from Sperling in November 1971 (Count Nine); (3) Sperling bought one kilo of cocaine from Pacelli in December 1971 (Count Ten); and (4) Pacelli bought two kilos of heroin from Sperling around Christmas 1971.

16. This transaction is the offense charged in Count Nine.

17. This transaction is the offense charged as Count Ten.

18. We also hold that Sperling's conviction on Count Two was not affected by the absence of the Lipsky-Feffer letter.

19. We find no merit in Schworak's claim that his Fifth and Sixth Amendment rights were violated because he was compelled to stand trial without the assistance of retained counsel. We hold that the court correctly concluded that Schworak attempted to manipulate his right to counsel for the purpose of delaying and disrupting the trial. See United States ex rel. Davis v. McMann, 386 F.2d 611, 618-19 (2 Cir. 1967), cert. denied, 390 U.S. 958 (1968); United States v. Abbamonte, 348 F.2d 700, 703 (2 Cir. 1965), cert. denied, 382 U.S. 982 (1966); United States v. Bentvena, 319 F.2d 916, 936 (2 Cir.), cert. denied, 385 U.S. 940 (1963).

20. Juan also admitted that he drove a Mercedes automobile for which he paid $8200 in cash. It was this automobile that Lipsky

testified Juan used when the latter obtained cocaine in December.

21. We reject the claim of Del Busto and Garcia that the district court erred in denying their motions to suppress the cocaine seized from Del Busto at the time of his arrest. The arrest of Del Busto on probable cause and the search incidental thereto were proper. Their motions were correctly denied after a full hearing.

22. We also hold that Bless was not prejudiced within the meaning of Bruton v. United States, 391 U.S. 123 (1968), by the admission of a stipulation between his brother, Edward Bless, and the government which was read to the jury. The cautionary instructions given by the court were adequate to protect Bless' rights. United States ex rel. Nelson v. Follette, 430 F.2d 1055, 1059 (2 Cir. 1970), cert. denied, 401 U.S. 917 (1971); United States v. Cusumano, 429 F.2d 378, 381 (2 Cir.), cert. denied, 400 U.S. 830 (1970).

23. As stated above, we reverse the convictions of Bassi, Berger and Frank Serrano on the conspiracy count (Count One), and we reverse the conviction of Frank Serrano on the only substantive count upon which he was convicted (Count Three).

24. Berger and Frank Serrano also assert this claim. In view of our reversal of their conspiracy convictions because of the absence of the Lipsky-Feffer letter, there is no need to consider their claim here.

25. The government has emphasized the admittedly symbiotic aspects of the relationship between the Pacelli and Sperling organizations in an effort to justify its decision to try the members of both groups together. While there is clear evidence of drug sales between Pacelli and Sperling, the ties among the members of each group were much stronger than the ties between the two organizations. It would have been much wiser for the government to have tried the appellants in two separate actions, one incorporating those linked with the Pacelli group and the other incorporating those linked with Sperling. Except for Lipsky, there was no common witness against members of both groups.

26. The one saving virtue here was the highly competent manner in which Judge Pollack handled this case from beginning to end—something we have come to expect from him.

27. Judge Pollack charged the jury as follows:

> "I have reviewed with you the elements of substantive counts which the government must prove beyond a reasonable doubt before the defendants would be guilty. There is, furthermore, another method by which you should evaluate the possible guilt of each defendant and which would sustain his guilt on the substantive counts even though the government's proof was not

sufficient to establish all the required elements as to him. I have already instructed you as to the crime of conspiracy for which the defendants here are charged in the first count.

Now, if you find pursuant to those instructions that a particular defendant was a conspirator and hence guilty under the first count, you may find him guilty as well under a substantive count in the indictment, providing you find as to such count the following: you must find that the crime charged in the substantive count was committed and that it was committed during and in furtherance of the conspiracy charged in the first count. If you find this to be a fact, then each and every member of the conspiracy, just like a partner, is criminally responsible for the substantive crime and may be found guilty thereof. The reason for this is that a co-conspirator committing a substantive crime would in that case be an agent of the other members of the conspiracy."

28. See note 29, *infra.*

29. We also reject the claim of Garcia and Del Busto that, since the evidence against them was insufficient on the conspiracy count, the court's giving the so-called Pinkerton charge, based on Pinkerton v. United States, *supra,* 328 U.S. at 645, requires a new trial. While use of the Pinkerton charge might better have been avoided in this case, in view of the overwhelming evidence in support of their convictions on the substantive counts we hold that neither Garcia nor Del Busto was prejudiced by that charge. Compare United States v. Cantone, 426 F.2d 902, 904-05 (2 Cir.), cert. denied, 400 U.S. 827 (1970), heavily relied upon by the appellants. *Cantone,* however, holds that, where there is no direct proof that a defendant committed a substantive offense for which he is charged *and* where there is insufficient proof he was a member of the conspiracy in furtherance of which the substantive offense was committed, it is error to give the Pinkerton charge as a means of obtaining a conviction on the substantive count. Here direct proof existed.

30. We find no error in the denial of Sperling's motion for a new trial which alleged errors in more than fifty rulings of the district court. United States v. Sperling, 362 F.Supp. 909 (S.D.N.Y. 1973).

31. We find no merit in Sperling's claim that the court erred in denying his motion to suppress certain overheard conversations. His right to privacy was not violated when a police officer who was in the trunk of a car overheard two of his conversations while he was standing nearby on the public sidewalk. United States v. Ortega, 471 F.2d 1350, 1361 (2 Cir. 1972), cert. denied, 411 U.S. 948 (1973). Nor were

his Fourth Amendment rights violated by the admission in evidence of another of his conversations which had been recorded by means of a valid court-authorized listening device installed in a mailbox. United States v. Manfredi, *supra,* 488 F.2d at 597; United States v. Torello, 480 F.2d 764, 771-75 (2 Cir.), cert. denied, 414 U.S. 866 (1973). Finally, the warrantless search of Sperling's automobile was not in violation of the Fourth Amendment. United States v. Robinson, 414 U.S. 218 (1973); Adams v. Williams, 407 U.S. 143 (1972).

32. In affirming Sperling's conviction on Count Two, we also reject as frivolous his claims that his cross-examination was improper, that his sentencing was constitutionally defective and that the court improperly instructed the jury.

33. When this opinion was in its final stages of preparation, the United States Attorney notified us that Garcia had escaped and moved for dismissal of his appeal. We granted this motion and filed the following order on October 9, 1974:

"It is hereby ordered that the motion made herein by counsel for the appellee United States of America by a letter dated September 27, 1974 to dismiss the appeal of appellant Nelson Garcia (Docket No. 73-2714) because of his escape from federal custody be and it hereby is granted unless counsel for Garcia notifies the Clerk of the Court within thirty (30) days of the date of this order that Garcia has been returned to custody. Molinaro v. New Jersey, 396 U.S. 365 (1970); Brinlee v. United States, 483 F.2d 925 (8 Cir. 1973); United States v. O'Neal, 453 F.2d 344 (10 Cir. 1972); Johnson v. Laird, 432 F.2d 77 (9 Cir. 1970); Stern v. United States, 249 F.2d 720 (2 Cir. 1957), cert. denied, 357 U.S. 919 (1958)."

Unless the Clerk of this Court is advised by Garcia's counsel within thirty days of the filing of the above order that Garcia has been returned to federal custody, instead of the reversal of Garcia's conspiracy conviction and the affirmance of his conviction on Count Eleven here provided, his appeal will be dismissed with prejudice.

[Garcia's counsel having failed to notify the Court of Garcia's return to custody within 30 days of the above order, and Garcia in fact not having returned to custody, a judgment was entered on November 11, 1974 dismissing Garcia's appeal.]

APPENDIX D—REQUEST NO. 13

REQUEST NO. 13
Continuing Criminal Enterprise
Elements of the Offense
Second Count

Before you can find the defendant Herbert Sperling guilty of the crime charged in the Second Count of the indictment you must be convinced beyond a reasonable doubt that the Government has proved the following elements:

First: That the defendant Herbert Sperling committed the offenses charged in Counts 8, 9 and 10 of this indictment.

Second: That the offenses charged in Counts 8, 9 and 10 of this indictment are part of a continuing series of violations by the defendant Herbert Sperling of the federal narcotic laws as contained in the Drug Abuse Prevention and Control Act of 1970.

Third: That the defendant Herbert Sperling undertook to commit such offenses in concert with five or more other persons. (either named or un-named in the indictment).

Fourth: That the defendant Sperling occupied a position of organizer, a supervisory position or any other position of management with respect to such five or more other persons.

The fifth and last essential element is: Proof beyond a reasonable doubt that from the continuing series of violations, if such you so find, the defendant Herbert Sperling obtained substantial income or resources.

Now, I have already discussed the first element, which is you must be satisfied that Herbert Sperling is guilty under Count 8, 9 and 10.

With regard to the second and third elements of proof here in Count 2, in simple terms, as I am sure you understand, the prosecution contends from the evidence that they have shown a continuing series of transactions to possess narcotics with intent to distribute and actual distribution of the same through at least

five or more persons by Herbert Sperling.

Now, let me discuss with you the fourth essential element. That is the one, you remember, which requires proof beyond a reasonable doubt that Mr. Sperling is an organizer or manager or person in a supervisory position. Let me say that in this connection an organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activities in one essentially orderly operation or enterprise.

A supervisory position, as that phrase is used under the statute, can be defined as meaning one who manages or directs or oversees the activities of others.

Now, let me take up with you some of the definitions which may be important under the fifth requirement or element that Mr. Herbert Sperling be shown to have obtained substantial income or resources from illicit trafficking in heroin or cocaine or both.

First of all, I point out to you that in the content of this count and the underlying statute, "substantial" means something that is real or actual.

Furthermore, the word "substantial" connotes something having considerable or ample size or value.

Finally, I instruct you that the word "income" here can be simply defined as money or other material resources received or gained from illegal narcotics transactions. Incidentally, I instruct you also that it does not necessarily mean net income.

From what I have already said, ladies and gentlemen of the jury, it would follow that the phrase "substantial income" in this kind of a charge should be construed as far as possible in an objective manner. That is to say, in order to support a conviction under Count 2, you should find that Herbert Sperling received what any reasonable person would consider to be considerable or ample funds from trafficking in heroin or cocaine as an organizer or supervisor or manager.

Put differently, it would be insufficient to support any conviction here if all you were to determine was that Mr. Sperling

obtained occasional moderate sums of money or resources in connection with any possession of heroin with intent to distribute the same.

[Adapted from the charge of the Honorable Harold R. Tyler in *United States v. Manfredi,* 72 Cr. 810, at pp. 2783-2787 of the trial transcript for September 19, 1972].

EXHIBIT "E"
INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

HERBERT SPERLING, BEN MALLAH, NORMAN GOLDSTEIN, a/k/a Sonny Cold, JACK BLESS, EDWARD BLESS, VINCENT PACELLI, JR., NICHOLAS CUCCINELLO, a/k/a "Nicky Red," ISMAEL TORRES, PETER SALANARDI, COURTLAND SAMPLE, a/k/a "Bucky," JOSEPH CONFORTI, SAM KAPLAN, CECILE SPERLING, JUAN SERRANO, a/k/a John Negron, FRANK BASSI, JR., ANTOINETTE BASSI, ALBERT PEREZ, a/k/a Abbe Perez, FRED BERGER, AL BRACER, FRANK SERRANO, EDGARDO RAMIREZ, LUIS VALENTINE, a/k/a Ramon Lombardero, OCTAVIO DEL BUSTO, NELSON GARCIA, SUSAN WEYL and SALVATORE RUGGIERO, JACK SPADA, JOHN DOE, a/k/a "Eddie,"

Defendants.

The Grand Jury charges:

From on or about the 1st day of January, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, HERBERT SPERLING, BEN MALLAH, NORMAN GOLDSTEIN, a/k/a Sonny Gold, JACK BLESS, EDWARD BLESS, VINCENT PACELLI, JR., NICHOLAS CUCCINELLO, a/k/a "Nicky Red," ISMAEL TORRES, PETER SALANARDI, COURTLAND SAMPLE a/k/a "Bucky," JOSEPH CONFORTI, SAM KAPLAN, CECILE SPERLING, JUAN SERRANO, a/k/a John Negron, FRANK BASSI, JR., ANTOINETTE BASSI, ALBERT PEREZ, a/k/a Abbe Perez, FRED BERGER, AL BRACER, FRANK SERRANO, EDGARDO RAMIREZ, LUIS VALENTINE, a/k/a Ramon Lombardero, OCTAVIO DEL BUSTO, NELSON GARCIA, SUSAN WEYL, SALVATORE RUGGIERO, JACK SPADA and JOHN DOE, a/k/a "Eddie," the defendants, and Louis Mileto, Carlo Lombardi, Nicholas Lugo, Peter Aponte, Barry Lipsky and Alberto Gonzalez, named herein as co-conspirators and not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 4705(a) and 7237(b) of Title 26, United States Code, and Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would sell, barter, exchange and give away narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, not in pursuance of a written order of the person or persons to whom such narcotic drugs were sold, bartered, exchanged and given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, contrary to law, in violation of Sections 4705(a) and 7237(b), Title 26, United States Code.

3. It was further part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would distribute and possess with intent to distribute *** I and II narcotic drug controlled substances in exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. In or about May, 1971, defendant FRANK SERRANO transported approximately one-half kilogram of cocaine to the vicinity of 78th Street and Lexington Avenue, New York, New York.

2. In or about August, 1971, defendant JUAN SERRANO, a/k/a John Negron delivered to defendant VINCENT PACELLI, JR. one kilogram of cocaine.

3. In or about July, 1971, defendant EDGARDO RAMIREZ delivered two cans of lactose to 1420 Third Avenue, New York, New York.

4. In or about September, 1971, defendant JACK BLESS exited a building on West 96th Street, New York, New York carrying five kilograms of heroin.

5. On or about October 18, 1971, defendants LUIS VALENTINE, OCTAVIO DEL BUSTO, NELSON GARCIA and co-conspirator Alberto Gonzalez went to the vicinity of the Castillian Room Bar, 303 East 56th Street, New York, New York.

6. In or about November, 1971, defendant HERBERT SPERLING delivered to defendant VINCENT PACELLI, JR. two kilograms of heroin.

7. In or about November, 1971, co-conspirator Barry Lipsky delivered to defendant SUSAN WEYL two kilograms of

heroin.

8. On or about August 16, 1972, defendant, HERBERT SPERLING met with defendant BEN MALLAH in the vicinity of 844 Seventh Avenue, New York, New York.

9. On or about September 20, 1972, defendants HERBERT SPERLING and NORMAN GOLDSTEIN, a/k/a Sonny Gold, met in the vicinity of 844 Seventh Avenue, New York, New York.

(Title 21, United States Code, Section 846).

COUNT TWO

The Grand Jury further charges:

From on or about the 1st day of May, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, HERBERT SPERLING, the defendant, unlawfully, wilfully, intentionally and knowingly did engage in a continuing criminal enterprise in that he unlawfully, wilfully, intentionally and knowingly did violate Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A) as alleged in Counts Eight, Nine and Ten of this indictment which are incorporated by reference herein, which violations were a part of a continuing series of violations of said statutes undertaken by the defendant in concert with at least five other persons with respect to whom the defendant occupied a position of organizer, supervisor and manager and from which continuing series of violations the defendant obtained substantial income and resources.

(Title 21, United States Code, Section 848)

COUNT THREE

The Grand Jury further charges:

In or about the month of May, 1971, in the Southern District of New York, FRANK SERRANO and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and

knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one-half kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

In or about the month of August, 1971, in the Southern District of New York, JACK BLESS, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately two kilograms of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT FIVE

The Grand Jury further charges:

In or about the month of September, 1971, in the Southern District of New York, JACK BLESS, the defendant, unlawfully, intentionally and knowingly distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately five kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

COUNT SIX

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, *** EDWARD BLESS, VINCENT PACELLI, JR., ALBERT PEREZ, a/k/a ABBE PEREZ, EDGARDO RAMIREZ and AL BRACER, the defendants, unlawfully, intentionally and knowingly did distribute and

possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18 United States Code, Section 2)

COUNT SEVEN

The Grand Jury further charges:

In or about the month of August, 1971, in the Southern District of New York, JUAN SERRANO, a/k/a John Negron and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly, distribute and possess with intent to distribute, Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT EIGHT

The Grand Jury further charges:

In or about the month of July, 1971, in the Southern District of New York, HERBERT STERLING, BEN MALLAH and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code Sections 812, 841(a)(1) and 841(b)(1)(A), Title 18, United States Code, Section 2).

COUNT NINE

The Grand Jury further charges:

In or about the month of November, 1971, in the Southern District of New York HERBERT SPERLING, BEN MALLAH

and VINCENT PACELLI, JR., the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT TEN

The Grand Jury further charges:

In or about the month of December, 1971, in the Southern District of New York, JUAN SERRANO, a/k/a John Negron, VINCENT PACELLI, JR., HERBERT SPERLING and BEN MALLAH, the defedants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT ELEVEN

The Grand Jury further charges:

On or about the 18th day of October, 1971, in the Southern District of New York, LUIS VALENTINE, a/k/a Ramon Lombardero, OCTAVIO del BUSTO and NELSON GARCIA the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 338.5 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT TWELVE

The Grand Jury further charges:

On or about the 13th day of November, 1971, in the Southern District of New York, ALBERT PEREZ, a/k/a Abbe Perez, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 121.7 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A); Title 18, United States Code, Section 2).

Foreman

WHITNEY WORTH SEYMOUR, Jr.
United States Attorney

EXHIBIT "F"

***

also makes it unlawful for one to engage in a continuing criminal enterprise or in a series of violations of the Controlled Substances Act in concert with five or more other persons with respect to whom one occupies a supervisory or managerial position and obtains substantial income.

Count 2 is asserted against only the defendant Herbert Sperling. Before you can find the defendant Herbert Sperling guilty of the crime charged in the 2nd count of the indictment you must be convinced beyond a reasonable doubt that the government has proved the following elements:

First, that the defendant Herbert Sperling committed the offenses charged in counts 8, 9 and 10 of this indictment. Those counts, as you will hear, charge specific substantive offenses in July, November and December, 1971, by Herbert Sperling and Vincent Pacelli, and in the December offense also by Juan Serrano.

Second, that the offenses charged in counts 8, 9 and 10 of this indictment are part of a continuing series of violations of

the defendant Herbert Sperling of the Federal narcotic laws as contained in the Drug Abuse Prevention and Control Act of 1970.

Third, that the defendant Herbert Sperling undertook to commit such offenses *in concert with five or more other persons, either named or unnamed in the indictment.*

Fourth, that the defendant Sperling occupied a position of organizer, a supervisory position or other position of management with respect to such five or more other persons.

The fifth and last essential element is: proof beyond a reasonable doubt that from the continuing series of violations, if such you so find, the defendant Herbert Sperling obtained substantial income or resources.

Now, I have already discussed the first element, which is you must be satisfied that Herbert Sperling is guilty under counts 8, 9 and 10, but with regard to the second and third elements of proof here in count 2, in simple terms, as I am sure you understand, the prosecution contends from the evidence that they have shown a continuing series of transactions to possess narcotics with intent to distribute and actual distribution of the same through at least five or more persons by Herbert Sperling.

Now, let me discuss with you the fourth essential element. That is the one you remember which requires proof beyond a reasonable doubt that Mr. Sperling is an organizer or manager or person in a supervisory position. Let me say that in this connection an organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activities in one essentially orderly operation or enterprise. The supervisory position, as that phrase is used under the statute, can be defined as one who manages or directs or oversees the activities of others.

And let me take up with you some of the definitions which may be important under the fifth requirement or element that Mr. Herbert Sperling be shown to have substantial income or resources from illicit trafficking in heroin or cocaine or both.

First of all, I point out to you that in the context of this count and the underlying statutes substantial means something that is real or actual. Furthermore, the word substantial connotes something having considerable or ample size or value.

Finally, I instruct you that the word income here can be simply defined as money or other material resources received or gained from illegal narcotics transactions.

Incidentally, I instruct you also that it does not necessarily mean net income. From what I have already said, ladies and gentlemen of the jury, it would follow that the phrase "substantial income" in this kind of a charge should be construed as far as possible in an objective manner; that is to say, in order to support a conviction under count 2 you should find that Herbert Sperling received what any reasonable person would consider considerable or ample funds from trafficking in heroin or cocaine as an organizer or supervisor or manager. Put differently, it would be insufficient to support a conviction here on this count if all you were to determine was that Mr. Sperling obtained an occasional moderate sum of money or resources in connection with any possession of heroin with intent to distribute same.

I will now turn to the essential elements of counts 3 to 11. Before you can find the named defendants guilty of the crimes charged in counts 3 to 11 of this indictment you must be convinced and find beyond a reasonable doubt that the government has proved the following essential elements:

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